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Supreme Court, U.S.
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No. 05-5966

In The

Supreme Court of the United States

ERIC MICHAEL CLARK,

Petitioner,

vs.

STATE OF ARIZONA,

Respondent.

On Writ Of Certiorari To The Arizona Court Of Appeals

JOINT APPENDIX
VOLUME II, PAGES 105 TO 355

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TABLE OF CONTENTS

Page

VOLUME I

Relevant Docket Entries 1

REPORTER'S TRANSCRIPT EXCERPTS

Trial court proceedings – August 8, 2003 (at 77, line 4 to 79, line 4 3

Trial court proceedings – August 12, 2003 (at 4, lines 2-11 6

Trial court proceedings – August 19, 2003 (at 5, line 4 to 6, line 9) 8

Trial court proceedings – August 22, 2003 (at 12, line 5 to 121, line 23) 10

VOLUME II

Trial court proceedings – August 26, 2003 (at 4, line 9 to 201, line 19) 105

Trial court proceedings – August 27, 2003 (at 6, line 24 to 70, line 18) 282

TRIAL COURT ORDERS

Special Verdict 331

JUDGMENTS AND ORDERS UNDER REVIEW

Arizona Court of Appeals Memorandum Decision 336

Arizona Supreme Court Order Denying Petition for Review 355

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA

IN AND FOR THE COUNTY OF COCONINO

STATE OF ARIZONA,	)	
Plaintiff,	)	
vs.	)	Case No. CR 2000-538
ERIC MICHAEL CLARK,	)	
Defendant.	)	

REPORTER'S TRANSCRIPT
OF
BENCH TRIAL PROCEEDINGS
DAY 10

August 26, 2003
9:08 o'clock a.m.
Flagstaff, Arizona

BEFORE: HONORABLE H. JEFFREY COKER
Judge of the Superior Court

PREPARED FOR: THE DEFENDANT (Certified Copy)

* * *

[4] THE COURT: Counsel, you may call your next witness.

MR. POWELL: Dr. John Moran, your Honor.

THE COURT: Sir, if you would please come up here to the clerk station, raise your right hand and be sworn.

(Whereupon, the witness was duly sworn by the Clerk.)

DR. JOHN MORAN

called as a witness herein, having first been duly sworn, was examined and testified as follows:

THE COURT: Sir, if you would please walk around there and be seated. Sorry we don't have a bailiff this morning.

Are you going to be using the –

MR. POWELL: Not for a bit, Judge.

THE COURT: Okay. Thank you.

[5] MR. POWELL: It just takes a while to warm up.

THE COURT: Never mind. Thank you.

DIRECT EXAMINATION

BY MR. POWELL:

Q. Good morning, sir. Will you tell us your name please.

A. John Moran.

Q. And your occupation?

A. Psychologist.

Q. And where do you work?

A. I'm in private practice in Phoenix, Arizona.

Q. And could you tell us a bit about your practice?

A. My practice is primarily forensic at this point. I would say that 75 percent of my work is related to performing evaluations that are to be used in a legal setting. These include criminal evaluations, such as the issue of insanity, domestic relations cases, evaluations of sexually violent persons, Rule 11 evaluations or competent to stand trial. Remaining 25 percent of my work I think is best described as a general clinical practice.

Q. Would you please tell us your educational and professional background?

[6] A. I received my undergraduate degree at the University of Notre Dame. I did my graduate training at the University of Maryland in the department of clinical psychology. I completed my internship in clinical psychology at the University of Florida Teaching Hospital. Since then, I have participated in continuing education programs.

Q. And how long have you been practicing in the Phoenix area?

A. 20 years.

Q. And can you please tell us the licenses you have and accreditations you possess?

A. I'm licensed as a psychologist in the District of Columbia, the State of Maryland and the State of Arizona.

Q. And since when in Arizona?

A. Since 1984.

Q. And have you testified in superior courts in the State of Arizona regarding forensic issues?

A. Yes, I have.

Q. And since when, approximately?

A. Maybe 1990.

Q. And, again, it would be the areas you have described earlier?

A. Yes.

[7] Q. I understand in Maricopa County has a list put together by the Superior Court judges of individuals who are admitted to do certain types of evaluation?

A. Yes.

Q. Competency, insanity. Are you a member of that list?

A. Yes, I am.

Q. And how long have you been on that list?

A. Probably 12 to 15 years.

Q. Would you please tell us what a forensic psychologist is?

A. A forensic psychologist is a psychologist who practices psychology for the specific purpose of utilizing for the specific purpose of providing the Court a psychological perspective the advocation to legal matters.

Q. And, again, you have qualified as an expert in numerous courts?

A. Yes, I have.

Q. Are you knowledgeable, sir, as to the Arizona law regarding insanity?

A. Yes, I am.

Q. And that would be A.R.S. section 13-502?

A. Correct.

Q. And have you testified in insanity cases in [8] the past?

A. Yes, I have.

Q. Were you asked to perform any type of mental health evaluation with regard to the case of State versus Eric Clark in Coconino County?

A. Yes, I was.

Q. When were you first retained, if you recall?

A. September of 2000.

Q. And was that by the Coconino County Attorneys Office?

A. Yes, it was.

Q. And did you author a final report dated July 22nd of this year?

A. Yes, I did.

Q. What I'd like to do, sir, is ask you to kind of go back with me. Let's go back and see what you commonly do and did in this case in order to prepare a written evaluation for a court.

A. Okay.

Q. Could you please tell us what the normal setup would be as far as your efforts?

A. Typically, there's a telephone consultation or in-person meeting with the attorney who is retaining me. The attorney provides an overview of the case, provides documents that are reviewed before meeting with the [9] defendant. I then meet with the defendant, either one or two times, I administer the defendant psychological tests, I sometimes talk with collateral witnesses for sources of data and prepare a report.

Q. Would it be fair to say that's pretty much how the evaluation came about regarding the defendant here today?

A. Yes, sir.

Q. Did you rely on any treatises or literature in arriving at your evaluation and conclusions here?

A. Yes.

Q. What did you rely upon?

A. Well, certainly, I relied upon the totality of the training that I have had; in addition, I consulted, reviewed a couple books on insanity evaluations, in particular, one by Dr. Rogers and another by Dr. Moen. (phonetic)

Q. And we'll talk about the DSM-IV-TR in a while, but you did rely upon that also?

A. Yes, I did.

Q. Did you consult with any other professionals regarding issues arising in this case?

A. Yes, I did.

Q. Who else did you consult with?

A. Jack Potts is a psychiatrist in Phoenix. [10] Early on in the case I consulted with a psychologist by the name of Alan Goldstein, who is in New York, and those were the only two consultations that I had.

Q. Now, you were not involved in the competency issue involving the defendant, were you?

A. No, I was not.

Q. Let's talk about the review of the case file. What types of things were you presented with by the county attorneys office or by my office after we assumed the prosecution?

A. I was provided information about the scene of the crime, interviews of the defendant's family, of associates or friends of the defendant, including teachers and former basketball coaches, youth leadership, youth group leaders, I was provided videotapes of the defendant from the night that he was arrested – or morning that he was arrested and also of the arrest that he had in April of 2000. I was provided copies of some of the news coverage that was generated around the time of his arrest. I was – I reviewed copies of experts – other experts who evaluated the defendant, either for the competence issue or regarding the sanity issue. I also received copies of police reports, specifically those related to his conduct at the time of his arrest.

Q. Let's talk about that for just a moment. Did [11] you feel that it was important to evaluate police reports involving the crime itself, the murder of Officer Moritz and the ensuing manhunt, for lack of a better word, and arrest?

A. In this type of case, it's the information that has to do with the events surrounding the crime that's the most important information to review.

Q. And did you take a good amount of time to go through those issues and those reports?

A. Yes, I did.

Q. Now, in your report dated 7-22-03 you listed a number of items that you had evaluated and reviewed. Correct?

A. Yes.

Q. Since then, by documents dated August 25th, '03, did you supplement that on things you have reviewed since the preparation of the evaluation?

A. Yes, I did.

MR. POWELL: Judge, what I'd like to do is add this into the defendant's notebook. It's a supplement to the doctor's report. I don't know if you want me to have this marked separately or if we could just stipulate it in.

MR. MIDDLEBROOK: That's fine, Judge. I mean, I just got it this morning, but go ahead.

[12] THE COURT: Why don't we have it admitted separately so it can be identified.

MR. POWELL: May I approach, your Honor?

THE COURT: You may.

Q. BY MR. POWELL: Doctor, I'm going to hand you what's been marked as Exhibit Number 99 and ask you if you recognize that document.

A. Yes, I do.

Q. What is that?

A. This is a letter I prepared to you which lists the documents that I have reviewed subsequent to my report submitted on July 22nd, 2003.

Q. And you presented that to me last evening, did you not?

A. Correct.

MR. POWELL: Your Honor, move for admission.

MR. MIDDLEBROOK: I have no objection.

THE COURT: It will be admitted. Thank you.

Q. BY MR. POWELL: Let me specifically go through and ask you about a couple – a number of areas. You reviewed all the police reports that were submitted to you?

A. Yes.

[13] Q. You're familiar with the Title 36 proceeding?

A. Yes.

Q. Reports generated, transcripts generated?

A. Yes.

Q. The Aspen Hill report?

A. Yes.

Q. From 1999, I believe?

A. Yes.

Q. Dr. Kassell's reports?

A. Yes.

Q. His Rule 11 testimony?

A. I don't believe I reviewed that.

Q. His defense interview?

A. Yes.

Q. Dr. Di'Bacco, his reports?

A. Yes.

Q. His interview?

A. Yes.

Q. Arizona State Hospital restoration program records?

A. Yes.

Q. Complete Coconino County Jail records?

A. Yes.

Q. Maricopa County Jail records?

A. Yes.

[14] Q. Dr. Parrish's complete set of reports?

A. I believe so.

Q. And her interview with myself?

A. Yes.

Q. Dr. LaWall's interviews?

A. Yes.

Q. And reports?

A. Yes.

Q. Or report, I should say.

Did you also view any movies in preparation for doing your evaluation?

A. I reviewed the videotape simulation of the events the day of the shooting.

Q. Any motion picture type video, also?

A. Oh. Yes. I viewed the movie Shaft, the movie Gone In 60 Seconds, and the movie The Matrix.

Q. And why was it that you viewed those three movies?

A. Because the defendant was reported to have had an obsessive interest in The Matrix and he had viewed the movies Shaft and Gone In 60 Seconds the night before the crime.

Q. Did you listen to any compact disks?

A. Yes, I did.

Q. What did you listen to?

[15] A. Dr. Dre.

Q. D-r-e?

A. Yes, D-r-e.

Q. And that's hyphen 2001? Is that the title of it?

A. I believe so, yes.

Q. And why was it that you listened to the CD?

A. That was marked in evidence as being the compact disk CD in the player in the truck when the truck was confiscated.

Q. Did you find anything of interest while listening to that CD?

A. Yes, I did. That CD was, I think, fairly characterized as a rap CD, and it contained many antisocial attitudes as part of the lyrics.

Q. Any reference to police officers or cops?

A. I believe that it did. I think that it says something to the effect of fuck the cops.

Q. Have you been shown a copy of the state's exhibit notebook?

A. Yes, I have.

Q. And the defense exhibit notebook?

A. Yes, I have.

Q. And you've reviewed those?

A. Yes.

[16] Q. And I know we've left some out. But is that a pretty good hunk of what you've had to review in anticipation of your report?

A. I think it's significant to add that I did view Mrs. Clark's journal, 19-page journal you provided last night.

Q. And that was just given to you last evening?

A. Correct.

Q. By myself. Did you have an opportunity to interview the defendant?

A. Yes, I did.

Q. On how many occasions?

A. Twice.

Q. And the dates of those?

A. June the 27th, 2003, for approximately 3.25 hours, and on July the 11th of 2003 for approximately 3.25 hours.

Q. Were those productive interviews, in your estimation?

A. Yes, they were.

Q. Please tell us about the interview 6-27-03, approximate time, where it took place, who was present.

A. It was at the Arizona State Hospital in Phoenix. And it's the restoration unit at the hospital. It occurred in a private room. Probably it would have [17] been an office. Present at the interview were the defendant, myself, and David Weinstock, who is the Ph.D J.D. post-doctural fellow who was along both to provide some administrative assistance and observe as a trainee.

Q. Now, did Mr. Weinstock or Dr. Weinstock, I guess I should say, did he participate in the evaluation portion?

A. I don't think that he said anything to the defendant at all in the first interview. In the second interview

perhaps he conveyed to me two or three questions that he'd like to have asked.

Q. And please tell us about the interview on June 27th.

A. The interview on June the 27th that we began by explaining the legal context to the defendant and making sure that he appreciated that I was retained by you, that what he said to me was not confidential, that he understood the purpose of the interview. I asked him if I could tape record it and he consulted with his attorney and declined that. That interview more or less followed a chronological history, so we began with his early childhood health and development and went through the various aspects of his history, including health, mental health, drugs and alcohol, school participation, athletic participation, his experiences in the family [18] large, his experiences in the workplace and up to the events that immediately preceded the shooting on June 21st of 2000. At that point, he told us that he was not present at the shooting on June the 21st of 2000 but, rather, he had spent a day in Page, Arizona, with a girl by the name of Sarah that he had met. So we talked to him some about that and got a better understanding of what he meant and what he had to tell us. And that was pretty much the scope of that interview.

Q. Let's go back just a little bit. You said you inquired of his family. Did – at any time during this interview did he mention aliens?

A. I believe he did.

Q. And what was the context of that, if you recall?

A. I started to ask him about the reports of him flicking off people at school and shaking a pen at them, and he – and then I asked him about why he was putting fishing line in his room and in his car, and he responded, I didn't want anyone messing with that. And I asked, who did you think would do that? And he responds, aliens, but I think the aliens look like people, terrestrial sophisticated people.

Q. Was there any follow-up on that comment about aliens?

[19] A. Yes. We talked about aliens quite a bit. I could read part of my report if you'd like me to.

Q. Certainly.

A. Okay. I asked him when he first had the idea about aliens –

MR. MIDDLEBROOK: Excuse me. I'm sorry, Doctor. Can you tell us what page?

THE WITNESS: Yes. I'm on page 34, line 14. Actually, line 13. So I had asked him when he first had the idea, and he responded about the time I decided to get home schooled and prepared for Y2K. I thought one of the reasons I was put in jail was because the aliens hated me. I thought that Flagstaff was full of aliens, that my mother, father, sister and brother were aliens.

Question: What kind of aliens?

Response: From a different planet.

Question: Why were the aliens here?

Response: I did not know why or why I think they are still here. I still think there are aliens that look like human beings.

Question: Do you think I'm an alien?

Response: You could be. Are you? No.

Is Dr. Weinstock?

No.

[20] Question: Were the – what are the aliens doing?

I don't know. Living like human beings.

Question: Why are they here? To take over? To expand their territory?

Response: I don't know what I thought then. Now I think they're expanding like maybe to do trades for stuff, maybe like sugar and broccoli.

Question: What do you best recall about what you were thinking then about why the aliens were here?

Response: I don't know. Probably something except they wanted to kill me.

Question: Why think that?

Response: I don't know. I did not think that anymore, but I think that's part of the reason why I'm –

Question: Why were you thinking that they wanted to kill you?

And then I noted that there seems to be a non sequitur there, because I asked that question and there was no

response. And so this morning I went to my notes, transcription of my interview notes from that day. And, in fact, what the transcription reads is:

Question: Why were you thinking that they [21] wanted to kill you?

Response: Yes, I thought they wanted me dead to poison me through my clothes and my food. At the Coconino County Jail they poisoned me badly. I don't know if it was an alien or human being. That's – that's why I went to the infirmary. I was peeing on myself. I was real sick for three months from the poisoning but a little bit sick for an entire year. I got rings on my toes but I was very badly sick only for about three months.

Q. BY MR. POWELL: Okay. Let's end it there. I know he goes on but let me ask you, where was this – the symmetry of the interview, where was this compared to the Sarah story?

A. This is about halfway through and the Sarah story was about three-fourths of the way through.

Q. And what did he tell you precisely about the referring to the – as the Sarah story?

A. He told me that after his parents left the movie theater, that he went back into watch Gone In 60 Seconds, and that he met a girl who was there by herself by the name of Sarah and she said – she asked him if he wanted to go to Page with her for the day, and they agreed. So after the movie, he and Sarah separated and she went to her house to get her bathing suit and such, [22] he went over by the Wal-Mart bus stop where he was going to wait for her to pick him up. And she picked him up at 1:30 in the morning. They then drove to Page. They spent the day

on the beach sunning themselves. They were on the beach all day, except for that they went to McDonald's for lunch. That – that he didn't get Sarah's last name. He had her telephone number which was written on a piece of paper that was in his pants but he was arrested but he believes the police lost that. And he wasn't able to identify the kind of car but I think he was – it was a white car.

Q. Did he mention his arrest?

A. He said that they stayed – they came back, that they left Page as the sun was going down, and when he came back, that she dropped him off around 8:30. He was walking home and suddenly the police arrested him and he didn't know why.

Q. Did you confront him with any of the physical evidence against him showing that he was, in fact, the killer?

A. No, I didn't.

Q. Tell us about the – does that pretty much conclude the first interview with the defendant?

A. Yes.

Q. What about the second interview on July 11th, [23] I believe.

A. The interview on July 11th focused more on the psychiatric symptomatology and questions about the aliens, about whether or not they can insert thoughts in his head. I asked him about the movie, Matrix, whether he thought it was true. Asked him why he was turning up his TV at home, why he would let the water run, why the burglary tools were in his car, about the jewelry in his car.

I asked him if he had been doing drugs. I asked him whether his brother had been abusive to him. I asked him some more about the aliens. I asked him about his suicidal thoughts. Then I talked with him some about his perspective on the advantages and disadvantages of pleading innocent as opposed to pleading guilty except insane.

Q. Did he appear to understand the difference?

A. Yes, he did.

Q. During the two conversations you had with him, what did he tell you about his drug use?

A. He told me that he first experimented with drugs when he was in the 7th grade. And there was approximately a three-month period when he would do drugs. He would smoke marijuana on the weekends in the 7th grade and then he stopped. That then in the 9th grade, in the summer of the 9th grade, he began to use [24] marijuana on a daily basis and to drink alcohol on weekends to the point of intoxication. That once he got his car, which would have been September of '98, his marijuana use increased even more. He was smoking it on average three or four times per day. That he would – he didn't like to smoke before school but sometimes he did. That he would smoke at lunch time. He'd smoke after school. That on the weekends he often drank alcohol to the point of intoxication. He said he would get drunk but he wouldn't pass out. Later on, he acknowledged that he sometimes would vomit.

Q. What type of tests were administered to the defendant?

A. The Minnesota Multiphasic Personality Inventory. That is a standard test used by psychologists to assess personality and credibility to some extent. It's 576

questions that are in a true/false format. The responses that the person gives are compared to other people who have taken the test and they are matched in terms of what groups the responses fit into as a way of providing a characterization for the person who took the test.

I gave him the structured interview of the recorded symptoms, which is a test designed to assess for malingering, and I gave him the Paulhus Deception Scale, [25] which is another test to assess his credibility.

Q. And could you take us through the results of the – those three tests in order please beginning with the MMPI?

A. Okay. On the MMPI consists of what's called nine clinical scales and three validity scales, and that one is part of the test he responded to items claiming to be unrealistically virtuous; in other words, he would not admit that he has the common foibles that most people have, such as that their table manners are better in restaurants than they are at home, that they occasionally lose their temper. But in spite of wanting to appear to be proper, he did acknowledge and endorse a number of items which were – showed unusual thinking. That overall, the clinical scales, his results were similar to individuals who tend to be quite disturbed psychologically. That he seems to be extremely angry and suspicious that others are taking advantage of him. He's overly sensitive to criticism, aloof, detached and regularly moralistic. He reacts to threats by projecting and rationalizing. He takes little responsibility for his problems, instead, blaming others and harboring grudges. Such clients may be overtly paranoid with delusions and clear ideas of reference. He's endorsed a number of extreme bizarre thoughts, suggesting the [26]

presence of delusions and/or hallucinations. Apparently, he believes that he has special mystical powers or special mission in life that others do not understand. He tends to be rigid in relationships and has a closed attitude towards others's view points and probably has disturbed social relations.

Q. Thank you. And you say there was also a deception scales?

A. Yes.

Q. And those were?

A. The Paulhus Deception Scale presented pretty much the same results as the MMPI, which is that – that he tends to present himself as being socially virtuous and he denies the foibles that most of us would acknowledge.

The second half of that scale he responded incorrectly to several of the items, and so I couldn't score.

On the Structured Interview of Reported Symptoms, he – one of the rare symptom scale, he endorsed he makes a very atypical presentation of psychiatric symptoms indicating a tendency – with a tendency to endorse very severe symptoms often with psychotic contents.

The – his score on this scale is probably [27] feigning range, so he appears to be exaggerating the intensity of his symptoms.

A second component of that test measures improbable or absurd symptoms, for example, do you have any unusual beliefs about automobiles, so that would be an absurd symptom, and his score on this subscale is in the honest range.

On blatant symptoms or symptoms that an untrained individual could identify as indicative of a major mental disorder, such as do you have any major problems with fighting evil forces, his scale – his score on the – the subscale is in the indeterminate range, that is out of honest range, but below the range of definitely feigning.

On subtle symptoms, so these are symptoms that untrained individuals would see as everyday problems and not indicating a mental illness. His score is at the high end of indeterminate range. So selectivity of symptoms.

THE COURT: Sir, I don't know what that means. Tell me what that means.

THE WITNESS: Indeterminate range?

THE COURT: No. The high end.

THE WITNESS: Okay. On the scoring for the text it's broken into three ranges, one is the honest [28] range, two is the indeterminate range and three is the obviously or clearly dishonest range. So he's at the high end of indeterminate range, which is meaning that you can't absolutely conclude that he's being dishonest but it's getting in that direction.

THE COURT: I see. Thank you.

THE WITNESS: Yes. Selectivity of symptoms, this is – suggests some individuals are not selective or indiscriminate in their endorsement of psychiatric symptoms; in other words, they are going to endorse symptoms that don't really go together as professionals understand them going together. And his score was in the indeterminate range. And severity of symptoms are that, this asked whether or not he's reporting an unlikely number of

symptoms with extreme or unbearable severity. On this scale he scored at the high end in indeterminate range, again, suggesting he may be exaggerating paranoid. And then on observed symptoms versus reported symptoms, he was in the honest range.

Then there are supplementary scales. Do you want me to go through those, as well?

Q. BY MR. POWELL: I don't believe we need to do those yet at this time.

Does that conclude the testing?

A. Yes, it does.

[29] Q. And overall thoughts as a result of the testing?

A. I thought that the testing supported that he's – the diagnosis of schizophrenia, paranoid type, that it – it supports ruling out malingering as a problem.

Q. Malingering is eliminated, is it not?

A. Yes.

Q. Let us go back. You've said you've interviewed the defendant, you've done the testing, you've also mentioned that you normally interview collateral witnesses.

A. Yes.

Q. Who else did you interview in this case?

A. I interviewed Mr. and Mrs. Clark, Gentry Clark and Aileen Clark.

Q. Okay. Anything significant with Aileen?

A. Not really. She did talk of one incident when her brother more or less erupted at her when she was playing with a cat toy and it irritated him.

Q. How about Gentry, anything of significance?

A. Gentry acknowledged that Eric sold drugs.

Q. Anything else with regard to mental health from Gentry?

A. No.

[30] Q. The father?

A. Well, Mr. Clark provided background information, filled in the details regarding some of the unusual behavior that he had observed. He also clarified the events that occurred on the evening before the shooting. And that was helpful to me.

Q. And when was his interview? When did you interview the father?

A. July the 11th, 2003.

Q. And the mother, when was she interviewed?

A. Same day, July the 11th, 2003. Like father, she helped to fill in the gaps regarding the background information, the psychosocial history, the details of his unusual behavior, and that the events that preceded the night – that occurred the night before the shooting of Officer Moritz.

Q. Were they helpful to you?

A. Yes.

Q. Did they appear to try to help their son?

A. Yes.

Q. With information they provided you?

A. Yes.

Q. On that day, July 3rd, (sic) '03, did you hear anything about Aaron's story?

A. No, I did not.

[31] Q. When is the first time you heard anything about Aaron's story?

A. I think it was at the end of last week in a telephone conversation with you.

Q. And I explained to you briefly about the Flagstaff being the platinum city, being inhibited by 50,000 aliens, 1,000 non aliens. Aaron was kind of a hostage because he has the keys to the city. Did I explain all that to you?

A. Yes.

Q. Had you heard anything similar to that before?

A. No, I had not.

Q. After you have your – well, let me ask you if there's anything else you have done of significance that the Court should know about before you sat down and actually started your evaluation and the construction of your report?

A. I think that pretty well covers it.

Q. So you reviewed the file, movies, the videos, the CD, interviews of the defense and family members, did the consultation with the experts, performed and graded the tests. That pretty much covers it?

A. Yes. I had some conversations with you or when I first was – accepted the case I had some conversations with Mr. Rozema.

[32] Q. Now, in reaching your evaluation and preparing a report for the Court, this is where the DSM-IV-TR comes in?

A. Yes.

Q. And how was it that learned treatise was used?

A. Well, I guess I'd like to state even at this point that the critical issue is whether his – the mental state of the defendant at the time of the offense, not his diagnosis, but establishing a diagnosis can be helpful as a – a way of understanding what his mental state might have been at that time. So the DSM-IV-TR is the diagnostic and statistical manual of mental disorders posed by the American Psychiatric Association, so it is a compendium of disorders and the diagnostic criteria that can be used to determine if a disorder is present.

Q. Now, in the world of insanity, that would be the first step?

A. Yes.

Q. First of two?

A. Yes.

Q. And how did you go about using the DSM in this case?

A. I entertained a number of hypotheses about what the diagnosis might be and systematically looked at the

DSM-IV as to whether or not the defendant's qualified [33] for those diagnoses. And as I combed through the material, I kept in mind what the criteria were trying to establish with more certainty what the diagnosis was. And, eventually, I arrived at a diagnosis as I put it in my report.

Q. Is there a bit of a process of elimination?

A. Yes.

Q. And, Doctor, how is it that a diagnosis is arrived at? I know you eliminate certain ones, but when you finally determine what your diagnosis is going to be, what is that based upon?

A. Well, it's based upon the configuration of data, look at the data and various sources of the data, and under a specific diagnosis, say, for example, schizophrenia paranoid type is – DSM-IV is going to say, person must have two out of the following five – meet two out of the following five criteria, whatever it is. And so you look and say, does the person meet this criteria? If so, where do they meet it? And if they meet it, then a diagnosis is established.

Q. With regard to the – well, these are symptoms of diagnoses. Would that be –

A. Yes, of the disorders.

Q. So you're looking at the symptoms of the disorders in order to make a diagnosis?

[34] A. Correct.

Q. And we've heard talk about the five axes?

A. Yes.

Q. Please explain that.

A. The DSM-IV diagnostic system involves five axes; and Axis I is for the major mental illness, Axis II is primarily for personality disorders, Axis III is to indicate if there are any medical conditions which are contributing to the presence of a major psychiatric illness, Axis IV is to specify what are the stressors that may have been contributing to the presence of the mental illness, and Axis V is a global assessment of functioning that is a rating of the person's overall level of function to either on the day that the diagnosis is given, it can be used to predict what a person's level of function would be if treated successfully.

Q. Did you perform all five testing for all five axes?

A. Yes, I did.

Q. Why would you do all five?

A. I believe that's the standard called for by the DSM-IV.

Q. Would there be exceptions where selected axes should be done and selected ones should not be done?

A. I don't believe so in a legal setting.

[35] Q. How do you make the Axis I determination? And if you could tell the Court again, what does that report?

A. Axis I, it reports the presence of a major psychiatric illness or disorder, and so that's where you go through the different disorders that are listed in the DSM-IV that are relevant to Axis I. You compare the signs and symptoms of any disorder that you see in the records or the testing and you compare that to the signs and symptoms

of the various disorders and determine whether or not one of those – there's a fit for the individual with the disorder.

Q. And were you able to do that in this case?

A. Yes, I was.

Q. And is that where you reached your diagnoses of schizophrenia paranoid type?

A. Yes, it is.

Q. Let's move to Axis II. How does Axis II work?

A. Axis II is personality disorders. Personality disorders are enduring and pervasive patterns of functioning that affect the individuals adversely across a variety of settings, such as family life, work life, school life, physical function. The DSM-IV lists I think it's nine different personality disorders, and then it also provides for what's called personality disorders not otherwise specified, that is that the person has the [36] traits or features of a personality disorder and seems to have personality problems that are broadly disruptive to their functioning but they do not fit into any one of the specific diagnostic categories listed in the DSM-IV.

Q. All right. Are there situations where an Axis I diagnoses is so prevalent overreaching that you can't even get to an Axis II?

A. Yes, there is.

Q. And did you feel that was the case in this situation?

A. No, I did not.

Q. Please explain that to the Court.

A. Well, as an example, one of the personality disorders in the DSM-IV is a schizotypal personality disorder which is characterized by oddness of thoughts, eccentricities of behavior, difficulty with interpersonal relationships. But it's different from the schizophrenia because it's not characterized by hallucinations or delusions. But if a person has schizophrenia, you'd also expect him to have oddness of behavior, oddness of eccentricities of behavior, oddness of thoughts and difficulty in interpersonal relationships. So you would not diagnose both of those. You would say that the schizophrenia incorporates or adequately covers those features of the personality disorder.

[37] Now, in this particular case, I think that the defendant had features of a personality disorder that preexisted or were what we call premorbid to the onset of the schizophrenia, that that was reflected in both his oppositional behavior, which is documented to have begun as early as in the 5th grade. I think its reflected in his selling or attempting to sell marijuana when he was in the 7th grade.

Q. And did you have a specific diagnoses there?

A. I think I just diagnosed him with personality disorder, not otherwise specified.

Q. Not one of the nine stated illnesses but the other?

A. Correct.

Q. And, again, that pre-dated, it was premorbid to the diagnosis of the Axis I?

A. Yes.

Q. Axis III, please explain that to us.

A. Axis III is the presence of any medical disorders which might bear on the psychiatric disorders; for example, if a person has hyperthyroidism. But in Mr. Clark's instance, I don't know of any medical conditions that are relevant.

Q. Did you inquire as to that area?

A. Yes, I did.

[38] Q. And that was through the defendant and his parents?

A. Yes. And record review.

Q. At times that can be a very telling diagnoses?

A. Absolutely.

Q. Axis IV, stressors, please explain that to us.

A. Psychosocial stressors are the stressors bearing on the individual which may be responsible for the presence of the psychiatric illness, so that can include things like economic problems, housing problems, family problems, legal problems, health problems, inadequate access to the health care system, those types of things.

Q. And did you inquire with regards to the defendant in this case as to those types of stressors?

A. Yes, I did.

Q. What did you find?

A. That the only problems that he was having in addition to his mental health problems was probably relationship problems.

Q. Explain that please.

A. Well, I diagnosed him to have schizophrenia paranoid type. That's a stress, but in addition to that or maybe as a product of that he was having problems in that he was socially isolated but he was not having [39] problems in that he had a good place to live, he had a good social support system, he had adequate – he had adequate finances.

It just comes to mind that I also wanted to add that in addition to the schizophrenia paranoid type, I also diagnosed him with alcohol abuse and with marijuana abuse on Axis I.

Q. I should have pointed that out. Before we get into V, let's go back and explain to the Court when you do this evaluation, at what stage of the defendant's life are you looking at, are you evaluating?

A. Well, for this evaluation, I was asking what was the diagnosis in the diagnostic formulation for the defendant the day of the shooting.

Q. And that is generally accepted in your professional field such an evaluation?

A. I think you can if you specify that that's what you're doing.

Q. So would this have been – I know we can't put hours on this, but is this immediately before the shooting? Is this 24 hours before the shooting? Or is there any range you can provide?

A. I was – in my mind I was thinking up to the moment of the shooting.

Q. Let's go onto Axis number V. Please explain [40] that to us.

A. Well, Axis number V, the DSM-IV provides the GAF scale as a way of describing the individual's global functioning at the time of the diagnosis is rendered. And the GAF scale is functions. It's describing both the intensity or severity of symptoms and the overall behavior of the individual. And it defines 10 different levels of functioning on a scale of zero to 100 with each 10 numbers indicating a different level of functioning. So you go from somebody who is healthy, is free from symptoms and rarely has trouble coping with their life, with their problems in their life, and they would be rated say a 95, to somebody who is an obvious danger to themselves and others, and they'd be rated as below a 10.

Q. And that is directly from the DSM-IV-TR, the scale itself?

A. Yes, it is.

Q. And did you reproduce the scale within your report for the Court?

A. Yes, I did.

Q. And I believe – is that on page 50?

A. Yes.

Q. And it ranks from zero, which would be inadequate information, to up to 100. Correct?

A. Correct.

[41] Q. And what was your ranking or rating of the defendant the instant before the shooting?

A. I rated him as being at the low end of 31-40 decile.

Q. And what does that play out to be in using the chart from the DSM?

A. Well, to use this chart, you're supposed to rate either the worst either the severity of the symptoms dimension or behavior symptoms dimension. And so as I understood Mr. Clark's functioning at that time, he was having some impairment in reality testing, for example, he thought that food was poisoned, might be poisoned or the water might be poisoned or that there was aliens living in Flagstaff, and I understood that he was having some problems in his behavior, particularly in the area of interpersonal relationships, some moodiness.

Q. Let's just look now. You said there were two facets to this, the severity of the symptom and the functioning, and you take the worst or the lower of those two?

A. Yes.

Q. And that's where you place the individual?

A. Yes.

Q. On the continuum of the scale?

A. Yes.

[42] Q. And is that how you did it in this defendant's case?

A. Yes, it is.

Q. I know during the defense interview with you it was asked why you didn't go any lower. Would you explain to us why you don't feel he belongs in the next lower area?

A. Because the next lower area, 21 to 30, says, behavior is considerably influenced by delusions or hallucinations or serious impairment in judgment – I'm sorry – serious impairment in communication and judgment, and they give examples, sometimes incoherent, acts grossly inappropriately, is suicidally preoccupied, or if they have an inability to function in almost all areas, stays in bed all day, no job, home or friends. I didn't think that the behavior that I had seen described was that severe.

Q. Now, you say you reached the lower end. Did you give a specific number?

A. I gave a 31.

Q. And when you reached your conclusion of 31 on the scale, had you known what Aspen Hill had arrived at a year before the actual murder?

A. No, I did not.

Q. Did you go back and look to confirm and try [43] and compare the two?

A. Yes, I did.

Q. And what was Aspen Hill's rating?

A. They rated him a 30.

Q. Just one point difference?

A. Yes.

Q. And that would have been in June of 1999?

A. Correct.

Q. And your rating was aimed at June of 2000?

A. Correct.

Q. Let's talk about sudden precipitous drops or rises in functioning ability. Would you like to comment on that please?

A. Yes. The – I guess I'd make three comments. One is that, well, the global assessment and functioning scale possible for a person to have a precipitous drop or a rise, that if a drop occurs you would expect it to be explainable as a response to a stressor.

The second comment I would make is that the global assessment of functioning scale is global, and that means it's looking at the overall function of the individual. And the issue that we have at hand today is a more specific question; and that is, what was his mental state at the time that he pulled the trigger.

The third comment that I would offer is [44] that the law specifies that in order to be found not guilty except insane but they must be suffering from a mental illness or defect of such severity that they can't judge the wrongfulness of their conduct. And so the question becomes, how does one quantify severity? And you can do it by saying mild, moderate or severe. Seems to be that the more specific you can be, the better, and that the GAF is both a professionally sanctioned scale for specifying behavior and it is more specific than mild, moderate or severe, but it does not answer the question of what was going through his mind at that exact time. However, it does give us some gauge or some calibration of the level of function he was at before the crime versus the level of function that he must have been at when he committed the crime.

Q. So we're not saying that this is going to answer exactly what was going through his mind at the time of the shooting, but this can give us some assistance in what led up to that, what his functioning ability was leading up to the shooting?

A. That is correct, and trying to arrive at some assessment of the severity of the mental illness.

Q. Well, is the GAF evaluation particularly helpful in certain areas, such as sexually violent predators?

[45] A. It's – I think it's useful in all areas. That's an area where it is useful, yes.

Q. To maybe change the subject just a bit, but since we're talking about stressors, would you agree that being arrested would be a stressor?

A. Yes.

Q. Incarcerated?

A. Yes.

Q. Charged with serious crimes such as first degree murder?

A. Yes.

Q. And, Doctor, you have responded to this already, but let me ask you again, once you reach a clinical diagnosis per the DSM –

A. Yes.

Q. – IV-TR, it's a clinical diagnoses?

A. Yes.

Q. Is your job as a forensic mental health expert completed at that point?

A. By no means. At that point, you have to answer such questions as, is there any relevance of the diagnosis to his behavior, and if there is relevance of the diagnosis to behavior, how did that relevance apply?

Q. And, again, you've told us you are very familiar with the insanity law in Arizona?

[46] A. Yes.

Q. And please explain to the Court what your understanding of the insanity law in Arizona is.

A. That there are two prongs that – for a person to be judged to be guilty except insane that they must have. First prong is they must be determined that they have a mental illness or defect. And the second prong is that it must be determined that the severity of that mental illness or defect is such that they were unable to understand the wrongfulness of their conduct.

Q. As a mental health professional, if you determined the defendant is suffering from a mental illness before, during and after a crime, can you infer that the second prong, which is technically not knowing the crime, the criminal act was wrong, has been satisfied?

A. No, you can't. For example, I could determine that a person is suffering from alcohol abuse, but that's the Axis I diagnosis. But, obviously, that doesn't pertain to or doesn't qualify under the law for a guilty except insane defense.

Q. What were – we have a clinical diagnoses, a person is charged with a serious offense, they have invoked the insanity defense, what is a forensic mental health expert to do at this juncture?

[47] A. They try and zero in on the mental state of the defendant at the moment of the crime.

Q. And how do you do that?

A. Well, there are several things that you want to know. The most important thing you do is you talk to the defendant. That's the main source of your data. You want to talk with the defendant. And to judge their mental state at the time of the crime, you want to find out things as simple as what had their pattern of eating been in the days – the day of the crime and let's say seven days prior to the crime, how had their sleeping been, whatever pattern of drug use and alcohol consumption had been, what – had they consumed any alcohol or drugs on the day of the crime, that when they entered into the situation in which the criminal act was performed, were they oriented to circumstances; in other words, did they have their wits about them enough that they knew that they were who they were, roughly what time of day it was, roughly what day of the week it was, did they know that the person that – in this instance, did Mr. Clark know that he was looking at a police officer. I'd want to know what his plan was at that time, that his behavior – he could assert I suppose that he didn't have any goal to his behavior, that he was a raving lunatic, as they say, and that the events that occurred were [48] purely chaotic.

But, short of that, the person or the defendant should be able to explain what the plan – their plan of behavior was, they should be able to explain what their goal of their

behavior was and what the motive of their behavior was. For example, if I had a case in which a fellow was judged to be guilty except insane when he killed his wife and he was able to describe in good detail with a lot of corroborating evidence that he believed that the Mafia were out to get him and that his wife was connected to the Mafia and that when he picked up – when she picked up the telephone, that either he killed her or the Mafia were going to come kill him, and so he did kill her and then he waited around for the police because he thought that he had committed an act which the police would understand as being legitimate self-defense.

So you want to understand what the goal is and what the motive is and what is it – ideally, we'd like to know what Mr. Clark thought he was doing when he pulled out the gun and shot Officer Moritz. Did he know he was shooting a police officer? Was he doing it because he thought that he was going to be arrested and he didn't want to go back to jail? Did he think he was doing it because he thought he was going to be arrested [49] for burglary? Did he think he was doing it because he thought Officer Moritz was an alien, was out to get him?

So we'd also want to understand what his thinking was, the criminality of the behavior. Did he understand that what he was going to do, that shooting a policeman was a criminal behavior that was punishable by law? That it was a major felony? And I'd like to understand what – why he left the scene the way he did, rather than staying around and waiting for assistance.

Q. And we'll come to quite a few of those areas. If a defendant is unwilling or unable to provide you with any of this information, do you have secondary sources?

A. The secondary sources then become the physical evidence available, either through the police reports, the radio dispatch calls, eye witness accounts, and then secondary sources are psychosocial history, psychological testing and those things. But those things obviously become more and more distant to the moment that is the critical moment at hand, at issue.

Q. So if the defendant is not willing or able to provide information, what is the next step you look to?

A. The physical evidence available.

Q. Do you look at decisions made by the defendant before, during and after the crime?

A. Yes, I do.

[50] Q. Even if they're not provided to you by the defendant?

A. Correct.

Q. And, again, how is such evidence that you've described to us and I just mentioned, how is that helpful to you?

A. Well, it's the information that I rely upon in order to draw conclusions that I assume that the eye witness accounts, the police reports and so forth are factual, and so I assemble the facts and apply them as best I can to a psychological perspective; what are those facts? How do those facts inform me about the defendant's probable mental state at the time of the offense? So, for example, if he's seen fleeing the scene of the crime and is able to evade capture, then I'm going to make certain assumptions, such as that he was oriented to place, because he was able to

navigate the place, that he was able to think in a goal-directed, logical fashion because he was able to construct a strategy which was successful in evading a fairly intense manhunt. That if he attempted to elude the police when he's found by the police or resists arrest, I think that that's going to provide a basis for me to conclude that he's able to understand that he's in trouble and that the police are police and that they're there for a function, which is to [51] capture and incarcerate him.

Q. Do you find it of interest if, again, the defendant is unable to supply you with information or unwilling to meet with the people that had seen him last before the criminal act took place?

A. Yes, I do.

Q. And let me ask you if – in light of the fact the defendant here did not give you any information which was helpful, did he?

A. Not about the crime, no.

Q. And what he did was told you about Lake Powell Sarah story?

A. Correct.

Q. Which you understand is disputed by the physical evidence?

A. Correct.

Q. In light of his failure to give you any information, did you perform the evaluation in this case that you described to us just now?

A. Yes, I did.

Q. Tell us what – what evidence or what information provided to you was of significance in reaching your opinion which we're going to get to in a while?

A. Well, all the data that helped to construct [52] his psychiatric history was useful, whether that was the medical records from Aspen Hill or some of the reports from his teachers and students and the reports from his parents. The psychological testing was helpful, as well, and the interview of the parents was helpful. I would cite those as the major sources.

Q. Let me go through some specifics and see if you factored these in and if you feel it was appropriate to factor them in. And, again, we're discussing the second prong of the test. Correct?

A. Yes.

Q. Something we have referred to as the Thorpe Park incident. Are you aware of that?

A. Yes, I am.

Q. And what is your understanding of what happened at the Thorpe Park incident?

A. Approximately two weeks before the shooting of Officer Moritz, that the defendant came upon three people in Thorpe Park, including a Jason Tackett, who had gone to high school with him, and while there he more or less bragged about his plan to lure the police into a situation and he could shoot the police.

Q. Do you recall him specifically mentioning a .22 caliber weapon?

A. I believe he mentioned both a rifle and [53] pistol.

Q. Each .22 caliber?

A. Each .22 caliber.

Q. And he – you recall him saying he was going to fire his gun into the air in order to lure the police, and as they exited their vehicle, he was going to shoot them?

A. Yes.

MR. MIDDLEBROOK: Judge, I'm going to object to the completely leading questions. I'd rather find out what Dr. Moran actually relies on and as opposed to the leading questions we're hearing.

THE COURT: Counsel, I allowed you to ask leading questions with the expert so the state may do the same.

You may proceed, counsel. Overruled.

Q. BY MR. POWELL: Did this incident factor in your conclusion?

A. Yes, it did.

Q. In what manner?

A. Established a possible motive.

Q. Did you find any significance with the commonality of the caliber of the weapon in light of the fact the officer was killed with a .22 caliber?

A. I found significance with that and with the [54] fact that he had mentioned a similar theme to Desiree Barreras, I believe, one of his associates, he had bragged about wanting to shoot the cops.

Q. And are you of the opinion this was something that should have been considered by a mental health expert in determining insanity or sanity?

A. Yes.

Q. Let's move on to June 20th of 2000, the day before the murder.

A. Yes.

Q. We've had testimony, I believe you've read all the reports, that the defendant met with his mother at sometime during the day?

A. Yes.

Q. I believe somewhere around 2:00 or 2:30?

A. Yes.

Q. And that she, I believe, at first took him to the Sizzler restaurant. Do you recall that?

A. Yes, I do.

Q. Do you remember reading any reports, interviews of an individual who worked at the Sizzler by the name of Chris Walsh?

A. Yes, I do.

Q. And was there any significance in Mr. Walsh's statements about his observations of the defendant that [55] day?

A. Yes, there was. He reported that Eric seemed to be doing better, that on that day Eric seemed to be functioning better than he had been or was typically. I think he

specifically said that he didn't wander around the restaurant. It seemed like he was daydreaming as he had done in the past.

Q. Do you recall Mr. Walsh saying the defendant commented on a fight he had been in at a party earlier?

A. Yes, I do. I recall that he talked about when he had – he asked whether Mr. Walsh had seen him, I think, whip Brandon's ass, or something to that effect, beat up on Brandon.

Q. Anything of significance in this meeting with Mr. Walsh and the defendant?

A. Well, if the issue is the mental status of the offender at the time of the offense, any information we can have close to the offense is significant.

Q. Now, if we go to the parents, I believe – well, let me ask you this: When the mother dropped off the defendant at the Sizzler, she did not feel that she needed to go in with him?

A. She didn't go in with him.

Q. Any significance to that?

A. She didn't feel he needed supervision.

[56] Q. And then, I believe – tell me if this is right – the mother picked up the defendant after he called. They went to the home and then she later took him to a convenience store to buy some kind of soda pop. Is that what you recall?

A. That's what I recall.

Q. And, then, after that, they returned home and the father came home?

A. Yes.

Q. And when the father came, I believe he – they agreed they were going to go to the movie and the father dropped him off at the athletic club to shower?

A. First he asked if he could be taken to the athletic club to shower.

Q. And he was left there by the father?

A. Yes.

Q. Anything significant there?

A. Yes, there is. You know, I suppose one way of illustrating it is to talk about Mr. Clark's behavior when he was in the jail, when he allowed himself to be surrounded by filth. And so, generally, you know, people who are more psychotic are more neglectful of their grooming and hygiene. So the fact that he's asking to take a shower is indicating higher levels of functioning rather than lower levels of functioning. It's indicating [57] he was not entirely psychotically preoccupied.

Q. And then we've had testimony that he was then picked up by his parents at the athletic club and they went to the theater?

A. Correct.

Q. And you mentioned – did you know he watched the movie Shaft?

A. Yes.

Q. And we've had testimony that the defendant was then allowed to stay – at approximately 9:30 allowed to stay at the theater, the Harkin's Theater, and the parents left for home?

A. Correct.

Q. And do you recall how each of the parents described the defendant when they left him at the theater?

A. They generally described – well, they described him as that he was normal; he gave them a hug as they left.

Q. So each parent described him as normal, as you recall?

A. Yes.

Q. Any significance to the fact that they allowed him to stay there at 9:30 in the evening alone?

A. Well, again, they didn't act on to supervise [58] him at that time.

Q. I believe I asked one of the parents whether or not they saw any type of a weapon concealed on the defendant on the way to the movie theater or at the theater after they were leaving, and they said, no. And I don't believe that was contained in any reports. I just want to give that to you for the rest of your opinion here.

A. Okay.

Q. We've also had testimony from Gentry, the brother, that he returned home I think around 1:30, placed the keys on his desk in his room.

A. Yes.

Q. And those were later found in the truck. Correct?

A. Yes.

Q. Is there any significance that the defendant would have had to – or if you want to comment, if the defendant would have had to somehow travel from the theater to the home, enter the home, enter Gentry's room, obtain the keys, somehow obtain a weapon, go out to Gentry's truck, unlock the truck, get in the truck, place the keys in the ignition, start the truck and drive a stick shift; up to that part, anything significant with regard to his mental health?

[59] A. Well, they all reflect on his capacity for functioning and for recognizing reality, for carrying out a fairly complex sequence of behavior.

Q. Now, we know it was a – he was driving around a quiet neighborhood between – there's been some testimony even before 4:00 a.m. but let's say 4:00 to 4:50 a.m., with some type of rap music blasting. And he would have had to have had a loaded gun next to him. Would you like to comment on that? Any thoughts you have as to his mental status again?

A. Well, I guess for me that, you know, on the one hand, it again is indicative of his capacity for functioning, but the exact meaning of that behavior or the goal orientation of that behavior I think is unclear.

Q. If one's intent was to provoke a police officer to come to you, would you consider this provocative behavior?

A. Yes.

Q. And you're aware that at least one witness said he counted, I believe, 22 laps that the defendant was going through his neighborhood?

A. Yes.

Q. And, again, with the loud music the entire time?

A. Yes.

[60] MR. POWELL: Judge, its 10:25. Would this be a decent time for the break?

THE COURT: That's fine. Ladies and gentlemen, we'll take about a 10-minute break at this time. Thank you very much.

(Whereupon, a recess was had from 10:25 a.m. to 10:47 a.m.)

THE COURT: Let the record reflect the presence of the parties.

Counsel, you may continue your examination.

MR. POWELL: Thank you, Judge.

Q. BY MR. POWELL: Doctor, is there anything about the fact that the defendant was driving a stick shift vehicle that stands out in your mind with regards to his mental abilities?

A. I recall seeing in the records that there was some discussion of whether he knew how to drive a stick shift, and to the extent that he didn't know how to drive a stick shift, what one was doing with that would demonstrate his capacity for concentration, coordination.

Q. Now, when we left off, I think you agreed it can be defined as somewhat provocative behavior if he truly did want to attract a police officer to him?

A. Yes.

[61] Q. And we do know that he had a loaded gun next to him or on him. Let's take it to the next stage. We know that Officer Moritz is dispatched. You're aware of that. I think you had transcripts of the dispatch tapes and all.

A. Yes.

Q. At some point, he put on his overhead lights. At some point, he has to put on his siren. He does make the comment, I got someone running on me. And we know from earlier testimony, it's been 50 seconds from the time he says, I got someone running on me, to the time he says, I will be out with him. We know, again, from prior testimony that the defendant stops the truck with Officer Moritz behind him, in his vehicle, and that this is stopped just about a half block away from the defendant's parents's home, his own home. Any thoughts on that?

A. Well, he could have chosen to proceed home, would be one of the options that was available to him.

Q. And I don't think you – well, you may be aware of this. Dr. Morenz testified on Friday that the defendant had told him, even though he felt his parents may be aliens, his family was still – parents were still his best friends. Were you aware of that?

A. Yes, I am.

Q. And although we have no eye witnesses, we do [62] know Officer Moritz does exit his vehicle and he is shot and killed.

A. Correct.

Q. And from what we understand, the evidence then shows that the defendant took the weapon with him, the .22 caliber weapon, and fled. Is that your understanding?

A. That's correct.

Q. Any thoughts on that as far as his mental abilities?

A. Well, it appears to reflect organized behavior, goal-oriented behavior, and possibly evasive behavior.

Q. Is evasive something you look for when you're dealing with the second prong of the insanity test?

A. Yes, I do. If, for example, sometimes a person will commit a murder in a state of insanity or an insane state and believe that what they did was legally wrong but morally right and, therefore, they don't need to escape and so they wait for the police to come, expecting that the police will be of assistance to them and understand why they did what they did.

Q. Evidence has been that the defendant was able to conceal himself for about 16-and-a-half hours and, as [63] you had mentioned earlier, a rather intense manhunt or search for him. Any thoughts on that as far as his mental abilities?

A. Well, again, I think that that reflects that he's oriented to the situation and he was engaging in goal-directed behavior. There seems to be little other explanation

for why he would not become visible in any neighborhood during that period of time, and it suggests that he was aware that he had done something wrong and that he needed to stay away from the police.

Q. There's also been testimony that when the defendant was located, he was near his home, seen by a police officer, and he then ran from police officers who were giving him commands and were in uniform telling him to stop. Any thoughts on that?

A. Well, again, it suggests that he was aware that he was in trouble and that he was attempting to evade capture by the police.

Q. When he's arrested he does not have a weapon on him, he does not have the handgun. And I believe you have seen a photograph of the recovery site. And I could tell you that he had been seen fairly near that just moments before his final arrest. Thoughts on that as to his mental state?

A. To the extent that he's trying to hide the [64] murder weapon, again, indicates that he knows what he did was wrong and he's taking evasive action.

Q. And that he's – as he's running from the police officers near his home, he does not stop his flight until he's confronted by two detectives who are armed with weapons. And one testified that he aimed his laser at his chest; at that point in time, he stopped. Your thoughts on that as to his mental state?

A. That that reflects his capacity for good judgment.

Q. Now, you are aware of the details of his arrest from your review of the police reports?

A. Yes.

Q. Did you see any evidence there that the defendant was frightened of the police officers or that he ever said anything about the police officers being aliens?

A. No, I didn't see that.

Q. And are you aware that shortly thereafter when he was being processed for some physical evidence there was a female detective helping to straighten his pants and he offered for her to be allowed to touch his penis?

A. I saw that, yes.

Q. How does that factor in, if at all?

A. Well, I suppose one could interpret it as that [65] he was being flippant as opposed to being intimidated.

Q. Doctor, let's just get to your opinion. We haven't gotten to that yet. What is your opinion as to the defendant's ability to know whether shooting Officer Moritz was wrong? What is your opinion?

A. My opinion is that with the reasonable degree – to a reasonable degree of psychological certainty, that Mr. Clark knew that he was committing a criminal act when he shot Officer Moritz.

Q. And please explain to the Court why you've reached that opinion.

A. I reached that opinion because, with the variety of data that I relied upon, would include, I guess, beginning with the statements that he made regarding his intent to shoot police officers, both at Thorpe Park and to Desiree

Barreras and Lisa Oedekerk, made comments about anti-police attitude, that if he was intoxicated at the time of the shooting, that that would mean that he would not qualify as being insane and he may have been intoxicated, though we don't know.

The evidence that we have, the best data that we have to base a conclusion then is the information about his functioning around the time of the crime. And for me that included the fact that he had been dating a girl, I think as recently as the end of April. And [66] though he was somewhat bizarre on some of those dates, he was capable of having a dating type of relationship at that time, at least in her opinion. That he continued to workout regularly at the club and to be paying attention to his hygiene and his physical status that way. That he continued to socialize to some extent; he went to the party, at the party he engaged in that act of fisticuffs, he broke the kid's nose. We know that he was intoxicated at that time. We know that then the following Friday, that was on a Wednesday, and the following Friday he went to The Museum Club where he was observed socializing. He was by himself but still placing himself in the presence of his peers. That around this time, school was completing, and I think he completed the school year and earned some passing grades, as well as completing the correspondence courses that he had begun in the fall of 1999. Then we have the reports of the fellow at the Sizzler who says he seemed to be doing better than he typically had been when he was at the Sizzler restaurant, and he was engaging in that conversation of having been in a fight. So, again, his aggressive behavior is emerging as a theme, as a conscious theme, as a theme of selected behavior rather than reactive behavior against aliens. That the parents then report

that he was doing relatively well on that night. His mother spent from [67] roughly 2:30 in the afternoon with him until 9:30 at night, and she reported him to be normal, which I'm sure means normal for Eric as opposed to doing worse, given his typical range of functioning, but doing better in his typical range of functioning. That then we don't have any evidence of a stressor between 9:30 at night and 4:30 in the morning that would accommodate or explain the precipitous drop in his level of functioning that must have occurred if one adopts an insanity theory.

So that, ultimately, I suppose there's two primary theories at work; one would be an insanity theory that his mental status took a nose dive and he saw the policeman as an alien and attacking him. And I don't think that it's my job to engage in theorizing. I think it's my job to opine about the mental state at the time of the offense; however, I did note that there was no where in the data that Mr. Clark had mentioned the police as trying to get him or attack him. And I also noted that all of his concerns about being killed were about being poisoned. And so, suddenly, we would have to have that at the moment of the crime for the first time his delusional system incorporates the police as aliens engaging in active acts of aggression other than trying to poison him.

On the other side – and it's also [68] important to me that that theory is based on inference and speculation – that on the other side of the theory that would hold that he was volitional, that he was acting with a purpose, that the purpose was either to shoot the cop or possibly to evade apprehension because he thought he was being busted for burglary, that the – there's more data on that side, which is let's call it first degree data or primary data, physical evidence, whether that is the attempt to evade

the policeman, the hiding successfully for 16-and-a-half hours, the hiding the gun, the attempting to avoid the policemen at the time of his capture. And then, additionally, I do think it's significant that between the time that he left the theater and when he shot Officer Moritz, that he had to have the wherewithal in order to get into the house without being detected and steal his brother's truck, which apparently was an unusual behavior for him. So all of those things together led me to the conclusion that he probably knew what he was doing, that he knew that what he was doing was wrong.

Q. Now, sir, you are aware that insanity is an affirmative defense. Correct?

A. Yes.

Q. And the burden is on the defendant to come forward with evidence. Correct?

[69] A. Correct.

Q. Now, at this point in time, you're not saying that you know what was going on in the mind of the defendant at the time of the shooting?

A. That's correct.

Q. And I believe Dr. Morenz told us the same on Friday.

So are you saying that it's – you have to look at all of the other data? Since the defendant has not made any statements to any mental health experts as to what happened, we have to look at everything else and conclude from there?

A. Correct.

Q. And it's your opinion that using first degree data, as you put it, there is much more evidence that the acts were volitional than an act of insanity which would have to be based on inference and speculation?

A. Correct.

Q. In the world of mental health, particularly in forensic work – and if I've asked this, I apologize. I don't think I have – can it be presumed or inferred that because a person was suffering from a mental illness before and after a crime, that they – that that would account for their activities at the time of the crime?

A. No. I don't believe so. I think that you [70] have to have something that specifically ties a mental illness to the behavior.

Q. And it's your understanding that's what's required under the Arizona law?

A. Yes.

Q. You discussed intoxication a bit. Now, we do know that the defendant, when screened on the 22nd a number of hours after the murder, was negative for anything except the tabulates of THC?

A. Yes.

Q. And something that I don't think you've been made aware of, Dr. Keen testified after getting ready for some toxicological work said that any drugs that would have been in the defendant's system at the time of the murder would have been gone by the time the toxicology tests were performed.

A. Okay.

Q. Do you have any opinion at this point in time whether or not the defendant was intoxicated or under the influence of any type of drug?

A. Well, I have observations in that regards. I recall that in the truck there was found a marijuana pipe that had his DNA on it, I believe, and he – when I interviewed him, I talked at some length about his use of drugs and alcohol and about any patterns of abstinence [71] that he had, and he had indicated that there possibly had been a pattern of abstinence early in 2000, but not after that. That I was impressed through the records where I saw statements by people that he had been drunk to the point that if – once on senior ditch day if he hadn't been pulled out of the creek, that he might have drowned. That I think another defendant – he told another of his associates on one day that he had consumed two bottles of wine and that he was wreaking of alcohol and that he asked his associate if he wanted to smoke a joint. So with all that information in the background and with the widely accepted premise in clinical practice that people tend to under report the extent of their substance abuse, there's quite a – I think that would lead to drawing a conclusion that he was probably intoxicated at that time.

Q. And, if so, your understanding of the Arizona insanity law, that would not apply. Correct?

A. Correct.

MR. MIDDLEBROOK: Judge, I didn't hear that last answer, but I think it's been a repeated thing, but Dr. Moran is apparently some kind of legal expert as the facts relate to the law. And I don't believe, unless he has legal training, that he's – foundation has not been laid for those

type of questions that should be asked, whether Arizona law is applicable to a specific [72] situation.

THE COURT: I will sustain the objection. That is appropriate.

MR. MIDDLEBROOK: Thank you, Judge.

MR. POWELL: Judge, if I may, for the record, 13-502 does require the doctor to be very knowledgeable about insanity law to be allowed to do what he's doing.

THE COURT: I understand, counsel.

Q. BY MR. POWELL: In talking about delusions, you said that the defendant seems to have the delusion when someone was going to kill him, they were going to poison him. Correct?

A. Yes.

Q. Are delusions usually compartmentalized or generic and general?

A. They are generally compartmentalized. With paranoid schizophrenia, for example, one of the characteristics is that at person's cognitive function remains largely intact outside the delusional area. Delusions can be circumscribed to one particular focus. For example, I had a case in which a woman attacked her husband under a delusional belief that he was being unfaithful to her. That was the only delusion that she had. It was very tightly circumscribed but, generally, [73] delusions are circumscribed to some extent so that a person is paranoid but able to function in society.

Q. And that's the cognitive area we were talking about?

A. Yes.

Q. Would you, as a professional, if a person is – who is suffering from schizophrenia and feeling that – and paranoia also, feeling that someone is going to kill them by poisoning them, would you anticipate that they are going to shoot someone who has no ability to kill them with poison at that time?

A. It's not consistent.

Q. Doctor, before I finish here, do you want to place any limitations on your opinion for the Court?

A. Yes. Well, I think that it is my practice and I think its accepted practice that many – any time an opinion is rendered, you can cite the limitation. And limitations in this case, as in any case, that the accuracy and validity of my conclusions depends on the accuracy and the completeness of the data that I was provided. That, in this particular case, the absence of information from the defendant is a significant limitation and it's a significant hole in the data in terms of coming to an understanding of what his mental status was at the time of the offense. For example, if [74] he did adopt a more corroborative and forthright attitude about what was going through his mind at that time, my opinion might be different.

Q. Okay. And you prepared a document or mental state of offense, and I believe I was going to put that up, and I provided this to you earlier. Maybe this would help. Would you like to address this for the Court?

A. Yes. This is a chart I saw in the book that I was reviewing in preparation for trial. And the author here is identifying levels of data for mental state at the time of

the offense evaluations, and he identifies primary data as the defendant interviews or third party information about the crime scenario.

After that, the secondary information which is more general about the social history of the individuals and prior medical and psychiatric records. Beyond that you're into secondary information which is more specific, such as psychological testing or any kind of neurological testing to, you know, confirm an act for mental disorders. But I think it illustrates in the primary data category we're missing a very important element, and that puts a limitation on both my – I think it puts limitations on my conclusions.

Q. And any other mental health professional that's trying to do the same thing?

[75] A. Correct.

Q. Doctor, at this time, as you sit here, having considered everything, can you provide the Court with any link between the defendant's mental defect and with the crime itself?

A. No.

Q. If we were to use a but for test, but for the mental defect would this crime have occurred, would this crime not have occurred?

A. I think the problem is that we don't know that.

Q. And your opinion that the defendant – well, please again give us your opinion within a reasonable degree of psychological certainty.

A. That the defendant did know that his behavior was wrong, that the severity of his mental illness was not

such that it incapacitated him from appreciating the wrongfulness of his conduct.

MR. POWELL: If I could have a moment, your Honor.

THE COURT: Certainly.

MR. POWELL: Thank you, Doctor.

I have no further questions. Thank you, your Honor.

THE COURT: Thank you, counsel.

[76] Mr. Middlebrook.

MR. MIDDLEBROOK: I need a minute to get set up, Judge.

THE COURT: Certainly.

CROSS-EXAMINATION

BY MR. MIDDLEBROOK:

Q. Dr. Moran, if I refer to your interview – there's a copy, Judge – I filed a copy with the clerk.

THE COURT: Thank you.

Q. BY MR. MIDDLEBROOK: Dr. Moran, I had an opportunity to interview you approximately a month ago. Correct?

A. That's correct.

Q. And then this morning we were given a complete list of probably an additional 15 to 20 documents that you reviewed after that interview?

A. Correct.

Q. Prior to your – prior to the interview, it would be fair to state that you had not reviewed any of Dr. Parrish's works; is that correct?

A. If it's not listed in the documents I reviewed, that would be correct.

Q. Last night I received a copy of your notes.

A. Yes.

Q. Correct?

[77] A. Yes.

Q. And I asked for that about a month ago. Correct?

A. You asked for it on July 23rd.

Q. Okay. I just want to have you – do you have a copy of that in front of you, your notes?

A. I don't believe so.

Q. No?

A. No.

Q. Well, let me just have you identify one document for me. I'm going to hand you what's been marked Exhibit Number 100. Ask you if, first of all, that was part of the notes you provided to me and, secondly, whether you would have authored that?

A. Um, well, these are parts of working notes. And I didn't author this document. This document was authored by David Weinstock. And that would have been –

Q. Is that a document that would have been sent to Mr. Rozema or Mr. Lessler earlier in the case?

A. I don't believe so.

Q. If you look through that document, please, I don't see any documents that are referenced within it that are subsequent to September, 2000. Would that give any bearing as to when that particular document was authored?

[78] A. Yeah. I believe it was towards the beginning of my involvement in the case.

Q. Okay. And would that document have been provided to the state, either to Mr. Lessler, to Mr. Rozema or to Mr. Powell?

A. Not that I'm aware of, except for as it was provided to Mr. Powell as it was to you.

Q. I'm sorry?

A. It was provided to Mr. Powell last night as it was to you.

Q. Correct. You've told the Court that you're a forensic psychologist. Does a forensic psychologist strategize with the lawyers?

A. Yes.

Q. Yes?

A. Yes.

Q. That's part of the evaluation process – independent, objective evaluation process is to strategize with the attorneys?

A. No. It's part of the preparation of court. It's part of the process that has to do with preparation for court.

Q. And also in preparing your reports?

A. No. I didn't strategize with him about that.

Q. Well, Dr. Moran, you told us that you authored [79] this particular document.

A. No, I didn't.

Q. Sometime – I'm sorry. Let me ask it a different way. You relied on this particular document early on in the case. Correct?

A. Correct.

Q. All right. And you're telling us that as an independent – as we look at your opinion contained in your report as to its independency, that you believe it's okay to strategize with the lawyers that have hired you?

A. I believe it's appropriate in legal cases to consult with the attorneys regarding the forensic aspects; that is, the intersection of psychology and the law. I don't believe it's appropriate for me to let a lawyer tell me how to do my job or think or how to write a report.

Q. All right. Now, in regards to your independence, you've never been hired by the defense to render an opinion. Isn't that true?

A. Regarding an insanity case?

Q. Correct.

A. That's correct.

Q. So your view of the Arizona law regarding insanity, your view of the – how certain behaviors may relate to that analysis, you've never been asked by the [80] other side to do that, have you?

A. No, I haven't.

Q. And you've been doing this type of work 12 to 15 years. Correct?

A. Correct.

Q. I'd like to turn your attention to that particular document that I have handed to you.

A. Yes.

Q. On page two of that document, does it set forth a strategy of, in this case, as to what the defense may do and what the prosecution may do?

A. Yes, it does.

Q. And so when you come into court and tell us about, for example, that Eric ran from the scene has significance, that voluntary intoxication he may have been under the influence has significance, that's all contained within this strategy, isn't it?

A. I accept your word that it is.

Q. You can, because I read it very carefully.

A. Okay.

Q. Also, you indicate in this strategy that –

THE COURT: Excuse me, counsel. You're misstating the evidence when you say, you indicate. It was authored by Weinstock.

MR. MIDDLEBROOK: But he's relied on it.

[81] THE COURT: They are two different things.

Q. BY MR. MIDDLEBROOK: Mr. Weinstine (sic) works with you?

A. Weinstock, yes. Yes.

Q. Okay. And the work that he does for you, you rely on, in particular in this case. Correct?

A. Yes.

Q. Okay. And so when Mr. Weinstock's outlining a strategy, that was something you asked him to do. Correct?

A. No. I didn't ask him to outline a strategy.

I asked him to review some documents, to provide me some summary of the documents. And I might point out, Mr. Weinstock is a Ph.D and J.D. so spontaneously and his own he presented it to me in this fashion.

Q. But you read it?

A. I read it.

Q. And considered it prior to writing your report. Correct?

A. That's correct.

Q. Okay. And as part of the strategy in – in preparing your report, you also relied on Dr. Jack Potts, who's the state's consultant in this case. Correct?

A. Correct.

Q. And you talked to him about what would be [82] contained in your report, didn't you?

A. Yes.

Q. Prior to writing your report. Correct?

A. Prior to releasing it.

Q. Doctor, wouldn't you agree with me that insanity is merely a gross impairment of reality?

A. I think insanity is a legal term.

Q. But you have rendered an opinion, have you not, as to whether Eric was insane at the time of the shooting?

A. I would more specifically disagree that insanity is merely a gross impairment of reality.

Q. And you would agree with me that anyone who says merely that it's a gross impairment to reality, that we should not consider their opinion wholeheartedly?

A. It depends on the context.

Q. If someone was being asked the definition of insanity and what it means, under that context, should we consider the opinion or not?

A. Could you repeat the question or rephrase it?

Q. My question to you was simply, do you agree that the definition of insanity is merely the gross impairment of reality?

A. I disagree with that.

Q. And you would disagree with the person that [83] would use that as a definition?

A. Yeah, I guess so.

Q. Especially where that person is being asked what their definition of insanity is?

A. Again, I think it would depend on the context, but broadly speaking, I would disagree with that.

Q. Well, Dr. Moran, I'm telling you the context in which this question was asked. I'm asking you, yes or no, do you agree with that opinion or not, if someone is being asked, what is your definition of insanity, and they told us, it's simply the gross impairment to reality, should we consider that person's opinion as accurate?

A. Well, I mean, the context, I don't know whether that's a conversation that occurred.

Q. Is that yes or no?

A. I can't answer it yes or no.

Q. All right. Well, let's turn to page 76 of your interview.

A. Okay.

THE COURT: Counsel, this has not been marked into evidence. Is it going to be?

MR. MIDDLEBROOK: I had asked your clerk to.

THE COURT: It's not been marked.

[84] MR. MIDDLEBROOK: It's just simply demonstrative.

THE COURT: Mr. Powell, do you object to me considering this as he questions him?

MR. POWELL: What is it?

MR. MIDDLEBROOK: It's a copy of the interview.

MR. POWELL: Is it going to be admitted?

MR. MIDDLEBROOK: It's not going to be admitted, no.

THE COURT: I don't know. That's the problem.

MR. POWELL: Well, I think it's hearsay, Judge. I don't think with – I don't see how it can be considered at this point in time.

MR. MIDDLEBROOK: It relates to prior inconsistent testimony, Judge, exception to the hearsay rule. It's clearly admissible to impeach a witness with a prior statement.

THE COURT: I'm going to allow it.

Go ahead, counsel. I will not admit it.

MR. MIDDLEBROOK: Judge, I would ask if you would like to turn to page 76.

THE COURT: Counsel, I think you have to establish what it is that he said wrong before I can read [85] it under the rules.

MR. MIDDLEBROOK: Judge, I think – I think that we're allowed to.

Q. BY MR. MIDDLEBROOK: First of all, let me just ask. Why don't you take a look at that interview and let me ask you a basic question. Does that appear to be a fair and accurate transcription of the testimony you

provided – or excuse me – as to the interview, the questions and answers that you provided to me?

A. What line is it?

Q. Just look through the entire interview at this time.

A. On page 76?

Q. No. You can just look through the entire interview. At this point, I'm not referencing any particular page. Dr. Moran, can you just simply look at the interview and transcript and tell me if that appears to be a fair and accurate copy of the question and answer session that we had?

A. It does.

Q. Okay. Now, please turn to the bottom of page 75. And I'm simply going to ask you whether this question was asked and whether this was your answer: When you say that last statement, when you say in order to determine the legal standard of insanity, are you [86] basing that on any authoritative text besides the statutes you cited?

On page 76, top line, well, gross impairment of reality testing is a common standard that's used in the community, and I think that there are symptoms that are associated with that.

Do you see that?

A. Yes.

Q. Was that your answer to the question that I asked?

A. Yes, it was.

Q. And you would agree with me, would you not, that you intended to mean that gross impairment to reality is a standard for insanity within your community?

A. I think that that's what I said, gross impairment of reality testing is a common standard that's used in the community.

Q. All right. So, in other words, if Judge Coker determines that Eric was grossly impaired as to his ability to perceive reality, he would be insane. Correct?

A. No. I'm saying on page 75 I said – your question was: Are you basing that on any authoritative text besides the statutes that you cited? And so I think that my answer can be understood that I was citing the [87] statute. And then, additionally, I was saying that within the community, that people talk about gross impairment of reality testing.

Q. I'm sorry, Dr. Moran. That wasn't the question I asked.

A. Okay.

Q. I know that you want to answer a different question, but that wasn't it. The question that I asked was simply, if Judge Coker determines that Eric's impairment to reality was grossly impaired, that under what you've told me is your answer as to a legal definition of insanity, Eric would be insane. Correct?

MR. POWELL: Objection, your Honor. Same objection counsel made when I asked a leading question of the witness.

THE COURT: I don't like the leading nature of it. I think the Doctor is trying to explain the answer and you're trying to ask him a question he can't answer because it's different, sounds like it's a very narrow –

MR. MIDDLEBROOK: Let me ask it this way – I will ask it this way.

Q. BY MR. MIDDLEBROOK: Within your community, psychological community, you would agree with me, most professionals rely on a standard of gross impairment to [88] reality in determining whether someone is insane or not. Is that a fair statement?

A. I think that has to be one component.

Q. Well, you certainly didn't add any other components to your answer, did you, when I asked that question?

A. Not at that moment.

Q. Okay. And, Doctor, let me ask you this: You understood that when I was there asking you those questions, and I had only received your report the day before that interview, that I was there to learn the nuances contained within your report?

A. I understood that.

Q. And you understood that that was going to be my interview of you so that I could prepare for your testimony today. You understood that, too, didn't you?

A. I did.

Q. And I also asked you that if there was any – at any time during my interview session with you that you

felt you needed to go back and clarify an answer, that I would always give you that opportunity, didn't I?

A. Yes.

Q. As we sit and speak today, Doctor, are there any answers that you feel are necessary to change?

A. I guess I would change that one.

[89] Q. Okay. Any others as we sit and speak?

A. I'd have to review the document to answer that. I did review the document and I found a number of things that I didn't think was expressed as well as I might.

Q. All right. When I was asking you those questions, your mind was clear, you weren't under stress, drugs, anything like that; is that correct?

A. That's correct.

Q. Let's talk about some things we might be able to agree on. First of all, you agree that Eric has paranoid schizophrenia?

A. He suffers from that, yes.

Q. And that as a sufferer of paranoid schizophrenia, that his – that he would be cognitively and socially impaired?

A. To some extent.

Q. And that one of the factors in looking at cognitive impairment would be standardized testing?

A. Yes.

Q. And that we know that from Eric's standardized testing from the 9th to the 10th grade, he significantly dropped in such things as reading comprehension and reading ability to about the 5th or 4th grade level. Correct?

[90] A. That's correct. We don't know whether he was intoxicated when he took that test.

Q. Is there any other thing you'd like to tell us about intoxication so that we can not have to keep having to insert that in every question or every answer that I ask you?

A. Not at this time.

Q. Because you've ruled out intoxication as a significant contributor to his psychosis, haven't you?

A. I recall that question.

Q. I'm sorry?

A. As a significant, yes. I don't think it was a significant contributing to his psychosis.

Q. All right. Do you have any evidence, Doctor, that Eric was intoxicated when he took those tests?

A. He said he got stoned every day from the 9th grade on.

Q. Okay. And so in the 9th grade he took those tests stoned and he did just fine; 10th grade he significantly drops.

A. Okay.

Q. So my question to you, Doctor, I mean, do you have any evidence he was intoxicated, yes or no?

A. No.

Q. All right. You told me during the interview [91] that Eric suffers chronically or continuous symptoms of paranoid schizophrenia. Correct?

A. Correct.

Q. As a chronic sufferer, he would be unable to perform complex tasks?

A. Correct.

Q. As a sufferer of schizophrenia paranoid type, he would suffer persecutory delusions?

A. Correct.

Q. Well-documented in this case?

A. Yes.

Q. He would suffer grandiose delusions?

A. Probably.

Q. For example, the rap stars are going to elect him president, would be a example of a grandiose delusion?

A. Yes.

Q. Paranoid schizophrenia is characterized by distorted thinking?

A. Correct.

Q. Sufferers of paranoid schizophrenia have a difficulty in distinguishing between external reality and internal reality?

A. At times.

Q. As a sufferer of schizophrenia, hallucinations [92] don't necessarily have to be command hallucinations to suffer them. Correct?

A. Correct.

Q. As a chronic sufferer of schizophrenia, we would expect to see someone's social habits deteriorating, for example, like leaving the bathroom door open while they defecate or urinate?

A. Correct.

Q. We'd expect that person to also have a lack of emotional response, flat affect is often the terminology; is that correct?

A. That's correct.

Q. And be – with paranoid type schizophrenia we would expect that person normally in their delusional state to be hostile, suspicious, and guarded?

A. Could you clarify by what you mean in their delusional state?

Q. Well, they're suffering paranoid type, they're typically delusional?

A. I think that they – I don't think that's specific enough. I think that there could be times that they are engrossed in their delusional state and other times when

the delusional state is more central from their mental status.

Q. Okay. Typically, does a paranoid [93] schizophrenic usually exhibit behaviors that are hostile and suspicious or guarded?

A. Not all the time.

Q. I'm not saying all the time. I'm saying is it typical behavior?

A. I'd say it's frequent. Common. Typical is fine.

Q. Well, actually, let's go back to that. DSM-IV criteria, what does it tell us about guarded, suspicious or hostile behavior?

A. That's one of the criteria.

Q. Specifically listed and gives in DSM-IV criteria for paranoid schizophrenia. Correct?

A. That's correct.

Q. Okay. And examples of that would be delusions about the end of the world?

A. Yes.

Q. And delusions about they're out to get me?

A. Might be, yes.

Q. Well, they're out to get me, can you tell me what type of delusion that would be other than paranoid?

A. Well, for example, in the MMPI there is a question that says, people are plotting against me, and that is commonly responded to in the affirmative by people who

are in custody disputes. So the idea that [94] people are out to get you is such a common phrase in our culture that I don't think it's specific enough to relate in and of itself in psychosis.

Q. Do you think Eric is involved in a custody dispute here, Doctor?

A. No, I don't.

Q. Okay. So if Eric was using the phraseology, they're out to get me, can you imagine what other context it would be than paranoid?

A. For Eric it would seem to be more paranoid.

Q. Okay. You're not trying to change your opinion here that Eric's not paranoid schizophrenic, are you?

A. No.

Q. Okay. You'd agree with me that typically paranoid schizophrenics are more sensitive to situations?

A. Depends on the situation.

Q. Critical or rejection type situations?

A. I'd agree with that.

Q. And, also, those can be perceived by the paranoid schizophrenic, even being very trivial rejections or criticism, can be inappropriately responded to. Correct?

A. I agree.

Q. You'd agree with me, would you not, that often [95] a paranoid schizophrenic's reactions to a particular situation are unpredictable and variable?

A. Can be.

Q. You'd agree with me that delusions often occur extraordinarily or rapidly?

A. It could occur rapidly?

Q. Correct.

A. That can happen.

Q. For example, they can have a moment they can see something on TV and believe God was speaking to them at that moment in time?

A. Yes.

Q. As paranoid schizophrenics – excuse me – if someone's suffering simply schizophrenia, it's often difficult to change those person's logics with reason?

A. Correct.

Q. For example, my mother's an alien, would be an example of repeated attempts by the mother to convince the son that he was not an alien or she was not an alien would be an example of that. Correct?

A. Correct.

Q. Or the school counselor comes in and says repeatedly to the students, you cannot have that class because you don't qualify, and yet the student continues on and on and on about trying to get a particular class, [96] that would be an example of that, as well, wouldn't it?

A. That wasn't clear to me that that was a product of his illness.

Q. I'm sorry?

A. If you're speaking about the incident that occurred at school, when I read that report, that wasn't clear to me that that was a product of his illness as opposed to his personality disorder.

Q. Well, Lois Wells told us – she testified – have you reviewed her trial testimony, by any chance?

A. No, I haven't.

Q. She testified that it was unbelievable that he would not change his mind.

A. Okay.

Q. And we're going to talk about your diagnosis of personality disorder shortly. We often see chronic schizophrenics neglect their personal appearance?

A. Correct.

Q. We often see their verbal communications as empty or obscured?

A. Correct.

Q. When questioned why patients, schizophrenics, believe in their delusions it's often, I don't know, I just know, basically contradictory logic but still their logic?

[97] A. Correct.

Q. And drug abuse is common among schizophrenics?

A. Correct.

Q. And often one of the problems becomes, how do you distinguish between drug-induced psychosis and the mental disease itself?

A. That's correct.

Q. It's kind of like pouring milk into coffee, after its there, it's a little hard to separate it. Correct?

A. Correct.

Q. With paranoid schizophrenics in particular, suicide's common?

A. Yes.

Q. As high as 40 percent?

A. I accept that.

Q. Okay.

A. Suicide attempts.

Q. All right. Often schizophrenics kill in response to the relentless pressure of, I can't take it anymore, they won't leave me alone, those are common themes among schizophrenics as to why they kill. Is that a fair statement?

A. I'm not familiar with that.

Q. All right. Let me ask you. I thought I saw [98] in your office A Comprehensive Textbook On Psychiatrists written by Kaplan in the year 2000. Is that a book that was in your office?

A. That was on the bookshelf, yes.

Q. Okay. I will show you some photocopied pages, but let me see if I can find it here very quickly. And just to be fair here, you rely on that textbook as a reliable source?

A. That is a reliable textbook, yes.

Q. Let me have you look at page 11. First of all, let me ask, just looking at that, whether that appears to be the Comprehensive Textbook Of Psychiatry written by Kaplan?

A. Appears to be.

Q. Okay. And when we're talking about violence of schizophrenics, does it appear under there that basically suicides, attempts to kill, that type of thing, are surprising because – and unpredictable?

A. Yes.

Q. Okay. And in regard to the predictability of violence, there is typically no clear signs that violence will occur?

A. Oftentimes there's not.

Q. For example, it's replete with literature of examples given with suddenly someone just walks in and [99] suddenly hangs themselves, walks in, apparently with no distress, kills their mother or sister because the sister a year before or the week before had said something to the effect of, I'm not going to ask you for your release at the hospital because you didn't do the dishes.

A. Those kind of anecdote reports are in the literature.

Q. And you would agree with me, would you not, that oftentimes one of the symptoms of paranoid schizophrenics, including this case, is child-like silliness, unpredictable and untriggered agitation?

A. I would agree with that in part. It's triggered, it's just that it's triggered at a much lower threshold.

Q. In other words, it doesn't take much to get someone going?

A. Correct.

Q. And you would agree with me that appearance – that a person's appearance eight hours prior to a violent act is a unreliable indicator of potential violence?

A. I think unreliable is too strong a word.

Q. Even in light of the literature that talks about how surprising, how quick, how things like that violence can occur with no apparent –

A. It might correlate with their behavior in [100] eight hours and it might not.

Q. So do you believe, yes or no, that appearance is a significant factor in predicting violence?

A. I believe it is.

Q. You do?

A. Yes.

Q. Okay.

A. I think depending on how you define appearance.

Q. Have you heard that phrase, you can tell a lot by the way a man thinks by the look in his eye?

A. I think I have heard that phrase.

Q. Do you agree with it as it's applicable to mental illness?

A. No.

Q. Okay. I'd like to clarify something, Doctor. You've ruled out malingering in this case. Correct?

A. Correct.

Q. And, in fact, you used the diagnostic criteria for DSM-IV as it's set forth, the criteria for determining whether someone is malingering, you used that criteria and ruled it out in this particular case. Correct?

A. Correct.

Q. And when you first interviewed Eric, you [101] believe that he was straight with you about the delusions that he explained to you. Is that a fair statement?

A. That's correct.

Q. And you have also ruled out drug-induced psychosis as a reasonable explanation for his long-term behavior?

A. Correct.

Q. Doctor, you're aware that in the numerous voluminous records, police reports that you reviewed in this particular case, the police's chronic thing was, we believe Eric was intoxicated, correct, at the time of the shooting?

MR. POWELL: Objection, relevance, Judge.

THE COURT: Overruled.

You may answer the question if you can.

THE WITNESS: What I recall is reading an objection that the interviews were – of the associates and so forth were emphasizing his drug behavior in excess.

Q. BY MR. MIDDLEBROOK: And very little discussion about his paranoia, his other bizarre behaviors with most witnesses. Correct?

A. That's correct.

Q. So when you rely on those reports, you have to rely on them with some skepticism, don't you, as a mental [102] health professional?

A. You have to be aware of it, yes.

Q. I'd like to talk to you a little bit about Eric's interview. And if at any point you need to refer to your notes about that particular interview, if you'll simply inform us that that's what you're going to do. Okay?

A. Okay.

THE COURT: Mr. Middlebrook, sounds like this is going to take a few minutes, and I have a meeting at noon I have to attend, so we'll take our noon recess at this time. I'd like to have everybody back at 1:30 this afternoon and we will reconvene at that time. Thank you.

MR. MIDDLEBROOK: Thank you. Could we have a quick meeting with you about a scheduling issue?

THE COURT: Yeah.

(Whereupon, lunch recess was had from 11:47 a.m. to 1:37 p.m.)

THE COURT: Let the record reflect the presence of the parties.

Counsel, you may continue your cross-examination.

MR. MIDDLEBROOK: Thank you, Judge. I need just a second.

[103] Q. BY MR. MIDDLEBROOK: We're going to talk about Eric's interview that you had with him. If at any point you need to either reference your report or specifically your notes related to that interview, would you just simply tell us that, Doctor?

A. Okay.

Q. First of all, during that interview session, was Eric cooperative with you?

A. Yes.

Q. And you were aware that as you were interviewing him that he was under the affects of Haldol, an anti-psychotic medication?

A. Yes.

MR. POWELL: Excuse me, Bryon, which interview is this?

MR. MIDDLEBROOK: It's the one dated June 30, 2003.

MR. POWELL: All right.

Q. BY MR. MIDDLEBROOK: Actually, you interviewed Eric twice. Correct?

A. Correct.

Q. Let me ask you whether or not he made the following statements during his interviews, okay, when you were interviewing him did Eric relate to you that this

pen this thing, the shaking, flicking of the pen was [104] a laser that only aliens could see?

A. Yes.

Q. And he thought that one of the reasons that he was put in jail was because the aliens hated him?

A. Yes.

Q. He also related he thought that Flagstaff was full of aliens?

A. Yes.

Q. And including his mother, his father, his brother and sister?

A. Yes.

Q. He asked if you were an alien?

A. Yes.

Q. It's apparent Eric still holds the belief that he – that aliens inhabit the planet?

A. It is.

Q. And I think he told you that – or when you asked him, why do you think the aliens are here, he told you that it was to expand their territory and trade for broccoli and sugar?

A. Correct.

Q. Okay. And I think when you were in this questioning phase, you went back to Eric and I think you kind of reference back to the time prior to the shooting of, you know, why were the aliens here, and he basically [105]

said, I don't know, but he continued to say that there was a constant – he had a constant belief that the aliens were trying to kill him?

A. I don't remember him saying that specifically.

Q. Would you look at page 34 of your report?

THE COURT: Counsel, do I have that report in here?

MR. MIDDLEBROOK: It's in the defense exhibits, Judge.

THE COURT: Exhibit which, counsel?

MR. MIDDLEBROOK: Page 34 –

THE COURT: No, exhibits, which one?

MR. MIDDLEBROOK: Oh, um, 5B, I believe.

THE COURT: And which page again?

MR. MIDDLEBROOK: We're on page 34 of his report.

THE COURT: Thank you.

Q. BY MR. MIDDLEBROOK: Towards the bottom of that page, Doctor, you noted that in your commentary with Eric the question was, line 26: What do you best recall about what you were thinking then about why aliens were here?

I don't know. Probably something except they wanted to kill me.

Why think that?

[106] I don't know. I don't think that anymore, but I think that's part of the reason why I'm – if – why were you thinking they wanted to kill you?

Yes. I thought they wanted me dead, to poison me through my clothes and my food. At the Coconino County Jail they poisoned me badly, et cetera. Correct?

A. Correct.

THE COURT: Counsel. I'm sorry. I take you for what you're saying, but it's not in here. B, 5B –

MR. MIDDLEBROOK: I'm sorry.

THE COURT: That is not conforming.

MR. MIDDLEBROOK: It would be – may I? I don't have my exhibit book with me, Judge.

THE COURT: Here.

MR. MIDDLEBROOK: I may have written the wrong number. There's an index at the front. Yeah, 5B.

THE COURT: Not my numbering.

MR. MIDDLEBROOK: No, the numbering on your copy is different. Here. Yeah. Dr. Moran and I had another problem when I was interviewing him. Maybe I can find it for you. Apparently, unfortunately, your numbering is different than ours.

Judge, it just occurred to me, I think I [107] have got another copy that references the same numbers. Let me grab it.

THE COURT: Okay. Thank you. I assume, counsel, you have no objection to this. It's your doctor's report.

MR. POWELL: No. That's fine, Judge. No objection.

THE COURT: Thank you.

MR. MIDDLEBROOK: Well, this is odd, Judge, because the copy I've got is the same one as yours, apparently, and yet it's different in my book.

THE COURT: Counsel, if you just want to tell me and I will take a note here.

MR. MIDDLEBROOK: I was going to see if I can find it on the page, Judge. It's apparently a few pages later. Your page is 36, your page is 36 and 37.

THE COURT: Okay. Thank you, counsel.

MR. MIDDLEBROOK: And, Judge, I'll try to make sure I get a copy of the two of the same pages as we reference through these.

THE COURT: Why don't you do that, ask the Doctor again so I know where you're talking about.

MR. MIDDLEBROOK: Yeah.

Q. BY MR. MIDDLEBROOK: As you talked to Eric, was it apparent to him that the aliens were constantly [108] trying to poison him prior to the shooting?

A. Yes.

Q. And when you were talking with him about the extent of the poisoning and I just read where I thought

they wanted me dead, they were trying to – he related to you that they were trying to poison him through his clothes, his food at the jail, in his car, which is why he had the bird?

A. Right.

Q. And when he told you about why he had the bird in the car, he – he more or less explained the story that it was kind of like a coal miner's bird, to test whether the air was poisoned?

A. Correct.

Q. And he also told you that, at some point, he believed that that bird, the aliens had actually taken that bird, replaced it with a robotic one and put it back so that way Eric couldn't tell whether the air in his car was poisoned or not?

A. Correct.

Q. And when he was talking to you about his belief that his parents at the time were aliens – on and off were aliens, he also commented, sometimes I think my mother is doing bad things for me. She tells people I'm schizophrenic.

[109] A. Right.

Q. And he also related to you that he thought his parents were keeping their identities as aliens secret from him?

A. Correct.

Q. He related to you that when he decided in his junior year, beginning of junior year not to play football,

that he believed it was at that time the aliens had poisoned him?

A. Correct.

Q. And that was around fall of 1999. Is – does that correlate with your time frame?

A. Yes. That's when he felt that he was first concerned about aliens.

Q. Okay. And, yet, we know that the first time he related to his mother the alien theme was April, 2000. Correct?

A. Correct.

Q. So he kept that to himself for a number of months?

A. Yes.

Q. When he was talking about getting in his car, he said words to the effect of, it was like poison in there?

A. Is that in my report?

[110] Q. Yes. It would be page – and I apologize to you, Judge – but it would be about page – towards the end of page 35, which would be their 36 or 37, Judge, line 24 and 25, I will read as follows: Are there memories of specific times you thought someone was out to get you?

I feel my clothes and they didn't feel clean. I felt they were poisoned. I opened the door to the car and it seemed like poison in there. I'd be breathing the air and it did not seem clean, so I thought aliens were trying to kill me a lot.

A. This is in my report or in the interview notes?

Q. Should be page 35, lines – as I see it in mine – let me double-check what I'm looking at – yeah, this would be your report, lines – page 35, lines 25 – what I just read was lines basically 23 through 26.

A. Our pagination doesn't agree.

Q. Maybe you have the same –

THE COURT: Why don't you start – work off the one we're all working off, counsel.

MR. MIDDLEBROOK: Yep.

Q. BY MR. MIDDLEBROOK: Let me look at the pagination of that. Let me look at the pagination of yours. Now, is this –

[111] A. That's my copy.

Q. This is your copy?

THE COURT: Mr. Powell, do you have a copy that we're looking at or do you have the one he's looking from?

MR. POWELL: Judge, I'm going to check. I may have – I think I have both.

THE COURT: See what we can do to be all on the same page.

MR. MIDDLEBROOK: Yeah. I apologize, Judge. Something's happened on the prints.

THE COURT: I don't have any line numbers on my pages, none at all.

MR. MIDDLEBROOK: Yeah, then that means – unfortunately, that means you got the e-mail copy. That would be page 37.

Look at page 37, Doctor.

THE COURT: All right. Thank you. And maybe you can just refer to two-thirds of the way down.

MR. MIDDLEBROOK: Yeah. Okay.

Q. BY MR. MIDDLEBROOK: Would – let me see how the end of page 37 is.

A. It's not – it's a different page. That's 36 now.

MR. MIDDLEBROOK: The pagination is even [112] worse than this one. I apologize. You know, Judge, what I would suggest is that we take a small break and – and get copies so everybody's on the same page. His copy is different than my copy and it's different than the copy that you have as far as pagination.

THE COURT: Are you going to be using it very much more?

MR. MIDDLEBROOK: I believe I will be.

THE COURT: All right. Which one are we going to agree on?

MR. MIDDLEBROOK: Which one – what copy do you have, Dave?

THE COURT: If you have a copy that has the lines designated numbered –

MR. MIDDLEBROOK: That's the copy that I have. Yeah, Judge, could we just take a minute and copy it because Mr. Powell and I have the same pagination.

THE COURT: Is there something else you can be talking about and she can – Lucy can start making copies while we work.

MR. MIDDLEBROOK: Um, sure. Actually, let me look through my notes real quick, Judge.

You know, actually, I think if I could just get through the interview portion, it looks like it's quite a while before I have to get back to the [113] report.

THE COURT: Okay.

MR. MIDDLEBROOK: So if we can kind of scuffle through this a little bit.

Q. BY MR. MIDDLEBROOK: I was reading lines (sic) 35. I think that would be your page – let me look, Doctor.

A. I'm sorry. I just don't see it in my report. I don't see it in my notes. I don't see it.

MR. MIDDLEBROOK: He doesn't have that in his group. Why don't I come back to this area, Judge. I will see if I can't move – and we're going to have to come back because his pagination, I think we've got five different copies, it looks like.

THE COURT: Is this something we can have Lucy working on while we're doing what we're doing so we can get some conformed copy?

MR. MIDDLEBROOK: Yeah. Why don't I give Josh my copy of my report and have them make copies for everybody, and at least that way we're more or less on the same page.

THE COURT: Three copies enough?

MR. MIDDLEBROOK: We'll need one, two, three, and I will need mine.

THE WITNESS: Do you think I – do you [114] think you need one more for me, a copy for me?

MR. MIDDLEBROOK: Only because we'll have all the same pagination.

THE WITNESS: Right.

MR. MIDDLEBROOK: I apologize. I didn't realize that was an error.

Q. BY MR. MIDDLEBROOK: All right. Let me talk a little bit about – kind of shift gears here a little bit. As you were talking to Eric – we'll come back and talk about the details of your conversations later.

A. Okay.

Q. But when someone is paranoid schizophrenic, they may or may not be a reliable historian as to events that occurred. Is that a fair statement?

A. Yes.

Q. And that could be, for example, people who refuse to cooperate with their attorney?

A. Correct.

Q. Or that their memory of the events may be unusual because of a psychosis or a delusion?

A. Correct.

Q. Now, one of the – in developing a history of a patient, a mental health provider basically is concerned about not only what a patient tells them happened, but also reliable sources independent of the [115] patient so that there can be more or less a comparison to determine, for example, whether the patient is a reliable historian or not?

A. Correct.

Q. And one of the things that you did in this case, and I think I told you during my interview I was very appreciative and I thought you did a very good job in developing a history by interviewing the Clarks. Correct?

A. Correct.

Q. And when you talked to Dave – excuse me – Terry and Dave Clark, do you recall at any time asking them anything about Eric's behaviors after Eric's arrest?

A. No.

Q. So I know that Mr. Powell was asking you whether or not you heard about Aaron's story. I want to tell you now that that was related about August 20th or 22nd, I'm not sure of the exact date. So you would not have asked Terry Clark or Dave Clark specifically about things Eric may have been saying after his arrest?

A. Correct.

Q. Now, when you consulted with Dr. Potts prior to writing your report, one of the things that you discussed was your potential diagnosis that Eric was paranoid schizophrenic?

[116] A. Correct.

Q. And he agreed basically with that diagnosis?

A. I believe he did.

Q. And one of the things that was also discussed was whether Eric was intoxicated on LSD or whether his psychosis was a result of LSD. Correct?

A. Correct.

Q. And that was ruled out, as well, in your – not only your discussions but by you, as well?

A. Correct.

Q. And if you were discussing the issue of insanity with Dr. Potts, you told him at that time that really you could look at this different ways?

A. Correct.

Q. During my interview with you, at some point, I asked you questions about what your assumptions were as to what happened during the shooting. Do you recall that?

A. Vaguely, yes.

Q. Okay. And I think, more or less, you told me you were – really weren't too concerned about the mechanics of the shooting because it didn't have a lot to do with ultimately your conclusions in this case. Is that a fair statement?

A. I said something to that effect regarding what [117] the prosecutors from Coconino County related to me.

Q. Right. And you've more or less told us this, but in developing the history that you have, one of the things that is relevant here is what context Eric put this shooting in. Is that a fair statement?

A. Yes.

Q. And what we have to do – what Judge Coker ultimately has to do in this case is, he has to look at objectively the facts that have been developed in order to try to decipher what Eric's internal reality was. Is that a fair statement?

A. That's a fair statement.

Q. And one of the methods or procedures that you used in that development was what's called the global assessment of functioning scale. Correct?

A. Correct.

Q. And you've told us that this scale is used by mental health clinicians for the purpose of determining someone's global functioning versus specific functioning. Correct?

A. Correct.

Q. And as we move down the scale – and I will put the scale up here in just a second – as we look at the scale as a clinician, again, what the standard procedures are in putting someone within a certain [118] category is to keep moving down the scale until the absolute worst symptom is shown according to the scale and not shown in the next one below it?

A. Correct, more or less.

Q. I may need to dim the lights just a little bit. Thanks, Josh. Whoops. If we need to get a better copy we will at some point.

Doctor, first of all, your rating of Eric was a 31?

A. Correct.

Q. That's a pretty low score, isn't it?

A. Yes.

Q. And, for example, when we're looking here at 31, 40 to 31, which is the category you put Eric in at the time of the shooting, there is discussions about that that behavior – there's some impairment in reality testing or communication. Correct?

A. Correct.

Q. And there's some major impairment in civil areas such as work, school, family relations, et cetera?

A. Correct.

Q. And, clearly, Eric displayed all of those symptoms?

A. To some extent, yes.

Q. Well, you put him at the lower end of the [119] scale. Correct?

A. Correct.

Q. Okay. And then we get into the 31 to 20 range here, and it talks about behavior is considerably influenced by delusions, hallucinations or serious impairment. Right?

A. Correct.

Q. So it's an inability to function in almost all areas; stays in bed, no job, home or friends.

A. Correct.

Q. Correct?

A. Yes.

Q. Let me ask you, with a score of 31, do you believe Eric should have been committed under a Title 36 proceeding?

A. Yes.

Q. And, Doctor, I don't know that – I know during our interview you were asked about what his GAF score was in admission to Aspen Hill. Correct?

A. Correct.

Q. And that was a 30?

A. Correct.

Q. Let me ask you, are you aware that at the Title 36 proceeding, Dr. Shelley Everley GAF'd him at 20?

A. I probably read that but it wasn't in my mind [120] until you just reminded me.

Q. Okay. And I have the documents if you need to look at them, so if at any point you think I'm being unclear or you need to reference it, please let me know.

A. Was she assigning that score for the time she saw him in jail or at the time of the crime?

Q. I'll show you. This is Aspen Hill, and he – the GAF is 30 there, and that was – that was one year prior to the shooting. Correct?

A. Yes.

Q. This is Dr. Everley's – Dr. Everley's GAF is 20, and she did not render an opinion as to the time of the shooting. This would have been dated 8-31, several months after his incarceration.

A. Okay.

Q. Okay. And then when he was admitted to the Arizona State Hospital, then, after being determined to be – to be incompetent the first time, his GAF was 31.

A. Okay.

Q. And the date of that is 4-3-01, I think it's – there it is, 4-2-01.

A. Okay.

THE COURT: Counsel, just – I didn't get the number of the doctor that did the Title 36 placed him in the GAF of what?

[121] MR. MIDDLEBROOK: 20.

THE COURT: Okay. Thank you.

Q. BY MR. MIDDLEBROOK: All right. Certainly, in determining what Eric's ability to function or that – as far as that relates to this particular scale, one of the things in looking to whether he should have been lowered into this 30 to 21 range would be whether his behavior was considerably influenced by delusions. Correct?

A. Correct.

Q. And one of the things that you would do in looking at that is whether his acts were grossly inappropriate. Correct?

A. Correct.

Q. And one of the things that this tells us is that?

THE COURT: "This," counsel?

MR. MIDDLEBROOK: This scale.

THE COURT: Okay. Thank you. I just need that for the record.

MR. MIDDLEBROOK: Thank you.

Q. BY MR. MIDDLEBROOK: What this scale tells us is that the person has no job or no friends?

A. Correct.

Q. And we know that Eric had no job and no friends as of 6-22, don't we?

[122] A. Technically, his parents were paying him $80 a week to do chores.

Q. Okay. Technically, but he was basically unable to do those tasks. You're aware of that?

A. Correct.

Q. And we certainly know because of the number of witnesses that have testified in here before, he would sit alone at high school on a bench by himself day in and day out. Is that the history that you have?

A. I have read that report.

Q. This was – I'm talking about testimony in this case as opposed to reports.

A. Yes.

Q. Would you agree that that's reflective of someone who has no friends?

A. Could be.

Q. And when his brother, Gentry, was interviewed by the police, Gentry told them, I basically don't know who his friends are anymore. No one hung out with him anymore. His best friend, Victor Meza, said, I quit hanging out with Eric months before this. You're aware of that testimony?

A. Yes.

Q. Okay. And you told me during your interview that while you did GAF him at 31, that Eric being pulled [123] over by the police could lower it by a couple of points?

A. Correct.

Q. So that would put him at 29 or 30. Correct?

A. In that range, yes.

Q. All right. In determining whether he was at 20, between 20 and 11, we look to see whether there was some danger of hurting self or others, occasionally fails to maintain minimal personal hygiene or there's a gross impairment in communication. Correct?

A. Correct.

Q. Okay. And one of the facts – some of the facts in looking at Eric's ability to function on the day of the

shooting would include, for example, knowing that just several days before at the Fitzhugh party he had been involved with a fight with a kid who basically said only that Eric changed, and Eric suddenly flipped out and punched him, broke his nose?

A. That's correct.

Q. We know that his mother the day – days before this shooting was earnestly, frantically searching for mental health professionals to have him committed?

A. Correct.

Q. And we know that through – that the county attorney's office was contacted and begged to prosecute for the purpose of forcing Eric into some type of mental [124] health counseling. Are you aware of that, as well?

A. Insofar as she said that she asked you to contact the county attorney's office.

Q. Well, I can assure you I did, and there is a stipulation that Judge Coker has that, in fact, I did do that.

A. Okay.

Q. Okay. When we're talking about acting grossly inappropriate here in this lower range – or excuse me – in this lower range, some danger of hurting self or others, we have to consider the fact that Eric was carrying weapons for months at a time. Do you know that?

A. Yes.

Q. Okay. And just – I don't know whether you know this. Are you aware that when he was arrested for DUI drugs, when the officer was searching him and taking

items off of him – now, remember, Eric went to a senior ditch day party. Right?

A. Correct. Yes.

Q. He had on him a can of pepper spray locked and loaded ready to go. Did you know that?

A. Yes, I did.

Q. Did you know he also had several knives, a club in his car with him?

A. I was aware of the special forces knife.

[125] Q. Okay. And are you aware also he had his bird?

A. Yes.

Q. You're also aware days before the shooting that – well, excuse me – the day before the shooting Eric's hygiene was extremely poor?

A. In some regards, yes.

Q. Right. I mean, he wasn't washing his hair. He may have gone to the athletic club to shower but he wasn't washing his hair. His hair was getting worse and worse. Are you aware of that?

Q. That's what his mother said.

Q. He was wearing – at the time of his arrest he was wearing multiple layers of clothing?

A. Correct.

Q. His clothing he was wearing for days on end?

A. Correct.

Q. And the evening before the shooting Eric told Adam Lozano, I've got mental problems?

A. Correct.

Q. Pretty unusual here that that statement would be made by Eric since after that and before that he never said he had any type of mental problems, did he?

A. I don't remember that statement. I suppose I thought – he said something to his mother at one point about he thought he had problems and she said, let's get [126] help, and he refused.

Q. Right. And then after that, after his post arrest, he's continually advocated that there is nothing wrong with him?

A. That's correct.

Q. That his mother says bad things when she says he's got schizophrenia?

A. Correct.

Q. His medication compliance is always kind of resistant because he doesn't believe anything is wrong with him?

A. Correct.

Q. In assessing the score that you did, one of the things that you told me during our interview was you thought it was significant that he was dating Nicole Benally just within six weeks of this shooting.

A. Correct.

Q. Did you rely on the police report for that fact or did you rely on Nicole Benally's transcript of her statement to the police as to that effect?

A. I don't recall.

Q. Okay. I will tell you now, Doctor, the police report reflects just as you stated.

A. Okay.

Q. Let me hand to you what's been marked as [127] Exhibit 101. And that is a transcript that I just received during the middle of this trial of Nicole Benally's actual statement to the police.

A. Okay.

Q. Okay. Let me ask you, have you ever reviewed it?

A. No.

Q. Turn to page 13.

A. Okay.

Q. Have you had time to look at page 13?

A. Yes.

Q. I'm going to paraphrase here, but starting at about page – or line seven, it says: And what year are we talking about, '99 to 2000 or '98 to '99? And she's referencing that her dating Eric, '98 to '99.

And then we drop down to lines 14 through 19: So that was basketball season, September to December of '98?

Uh-huh.

And when did you date him during that period?

Yeah.

So it's actually not just a few weeks before, as the police report indicates, but almost a year before – back up, more than a year before. Correct?

[128] A. According to this, that's correct.

Q. Okay. Let's also turn – during this period of dating, I'd like you to turn to page eight where she discusses some of the things they talked about. Lines 16 through five (sic) says: Okay. So just let me ask you just a few more questions and we'll get off this topic. First of all, it also says here Nicole told me that the officer that that's – the officer that Eric often talked of suicide and he told her he would do so by slitting his throat. Do you remember her – do you remember telling her that?

Uh-huh.

Did Eric talk to you about things like that?

Every – like he would do hints about it and stuff, and one time he just did – he did just flat out say.

Do you see that?

A. Yeah.

Q. That was not considered by you in your report, was it?

A. No. This is the first I have read this.

Q. And should it come up, I don't know if Mr. Powell will ask you these questions but I'm going to cover it just in case – Mr. Powell was asking a [129] particular witness that Eric had somehow dated Nancy Edmondson in late April. And, actually, I want to tell you what her testimony

was. She came over to his house, Eric's house. She had known Eric for a long time. And when they got to his bedroom, his whole demeanor suddenly changed, and he – and she's pregnant. She's about six months pregnant, and he starts asking her questions like, I wonder what it's like to have sex with a pregnant click. I wonder – or started asking her, are you afraid to die? Then as they were leaving, as she, you know, says, I need to get out of here, I got to leave, he strung his room up with strings and did all of that. And when he finally dropped her off and he leaves, she starts crying and shaking. Okay. That's the extent of any kind of dating that I'm aware of that Eric participated in within months of this shooting. Are you aware of those facts?

A. I was aware that what I read about Nancy Edmondson is that when they got back to his room and his sister left is when he started to be weird.

Q. Correct. Clearly, not the dating social interactivity you would expect of a normal teenager. Correct?

A. Outside that range, yes.

Q. And you're aware because we specifically [130] discussed the Aspen Hill – what I call the Aspen Hill arrest, where Eric was arrested then subsequently admitted into Aspen Hill?

A. Correct.

Q. Do you remember us discussing that specific?

A. Yes.

Q. Okay. During that interview with you, Doctor, you told me that you did not believe that under those circumstances that Eric would have been or should have been committed pursuant to a Title 36 proceeding. Do you recall that?

A. I don't recall right now, but I accept your word for it.

Q. Okay. That is in your interview, pages 59 through 63, if you do decide to look at that. But, basically, I was questioning you about Eric's sudden mood changes from laughing to crying, that type of behavior.

A. Okay.

Q. Correct?

A. Yes.

Q. And I was asking you about the symptomatology of schizophrenia; that being unanticipated, being unable to predict their likelihood of violence, and I was using that as an example. Right?

A. Yes.

[131] Q. And you told me you didn't think that was a good example.

A. Okay.

Q. Do you remember that? Is that more or less what you remember?

A. I think so.

Q. Okay. And, yet, we know that his father asked the police to arrest him after Eric swore at him and the look in Eric's eyes changed. Right?

A. Correct.

Q. And we know he was then committed to Aspen Hill for the next three days?

A. I think he was admitted. I think the term committed is actually a legal term. I don't think he was officially committed.

Q. Right. But we know at that time he was – he was GAF'd at 30?

A. Correct.

Q. Just under those facts. Correct?

A. Yes.

Q. And that was prior to Eric carrying – apparently carrying knives continuously, carrying guns continuously. Correct?

A. As far as we know, that's correct.

Q. I would like to turn to your diagnosis under [132] Axis II, personality disorder diagnosis. Okay?

A. Okay.

Q. I think you would agree with me that DSM-IV specifically says that a personality disorder, the key feature is an enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual's culture?

A. Correct.

Q. And you're saying that because Eric did something in the 5th grade and a single incident in the 7th grade, that established a personality disorder?

A. No. I think there's more to it than that.

Q. Well, let me ask you this: This personality disorder, again, DSM-III comments that he is inflexible, it crosses social academic and familial boundaries. Correct?

A. It can, yes.

Q. I mean, that is the key component, is it never – it's rigid; it is an enduring pattern. Correct?

A. That's correct.

Q. And, yet, we know that in the 8th grade there was apparently no problems with Eric, right, academically, at home, no major blowups. Right?

A. It did prove that, yes.

Q. Lois Wells told us in the 9th grade she hardly [133] knew Eric was there because there was no problems with him?

A. Correct.

Q. He was popular. He was elected home coming king.

A. Uh-huh.

Q. Freshman homecoming king.

A. Okay.

Q. And that in the 10th grade more or less the same thing. We don't – that's not an enduring pattern. Right?

A. Well, the issue I think would be whether it's a developing pattern

Q. And we know that schizophrenia, once the full-blown schizophrenia takes place, it's almost impossible to diagnose a personality disorder at that point?

A. It's very difficult.

Q. And you told me that you believed Eric had paranoid schizophrenia at least from his Aspen Hill admission in 1999?

A. Correct.

Q. You talked about the MMPI, the SIRS, SIRS testing, et cetera. Correct?

A. Correct.

[134] Q. Mr. Powell may have asked you this in all fairness but I don't recall. All of that testing as a clinician you must use very cautiously under circumstances like this?

A. Correct.

Q. And while the testing – you would agree that your testing gave a valid profile?

A. Correct.

Q. And that that profile includes, among other things, that Eric is quite disturbed psychologically?

A. Correct.

Q. He appears sullen?

A. Yes.

Q. He's overtly paranoid?

A. Yes.

Q. He has extreme bizarre thoughts?

A. Yes.

Q. And he believes in special mystical powers?

A. Yes.

Q. Under the Megargee Type H offender classification with the MMPI, Eric would be one of the most seriously disturbed inmates under the testing you provided?

A. Correct.

Q. He would be thought of as a crazy among other [135] inmates?

A. Correct.

Q. And this was all while – all while Eric was dosed with Haldol?

A. Correct.

Q. To be fair here, Dr. Moran, when you were discussing that Eric's beliefs in aliens and why he was believing in aliens and things like that, Eric never once attempted to use his belief in aliens as any type of excuse for his – for any of his behaviors?

A. That's correct.

Q. And that, the fact that Eric is not using that as an excuse, really kind of cuts both ways; it could be just as reflective as to the level of his psychosis. Correct?

A. Yes.

Q. The fact that he hides it, that he doesn't want people to know about it, could very well be reflective on the severity of symptoms he was suffering?

A. Yes.

Q. Let's get back to maybe some things we can agree to, Doctor.

A. Okay.

Q. You agree that at the time of the shooting Eric was delusional?

[136] A. Yes.

Q. And at the time of the shooting his delusions were persistent?

A. Yes.

Q. And immediately prior to the shooting we have no evidence that Eric was ever able to resist this thought pattern, these delusions?

A. Well, I suppose at times he was able to eat at home.

Q. We don't have any evidence he ever ate at home.

A. I thought that I saw in mother's report or somewhere in the data that occasionally that he would eat at home under special circumstances, though he didn't like to.

Q. If it was packaged foods, you're quite right, only if it was packaged food.

A. So that's, you know – that could be, I guess, some kind of an example of his ability to resist it.

Q. Well, he knew that the food was being poisoned at home but he believed if he ate only packaged food or out where everybody else did, right, that he couldn't be poisoned by the aliens.

A. Okay.

Q. Do you agree with that?

[137] A. Yes.

Q. Okay. And we know that Eric's entire behavior was one of complete paranoia, it was relentless?

A. It was continuous.

Q. Yeah. And those are the words you use, continuous?

A. Correct.

Q. And I asked you, 24 hours a day? And you said, 24 hours a day.

A. Correct.

Q. And you would agree that someone who's psychotic has a much lesser resistance to stressors in life?

A. Yes.

Q. And that, thus, are unable to perceive alternatives as readily as someone who is not psychotic?

A. I agree.

Q. And when Judge Coker reviews all of this evidence and when he's considering the severity of Eric's psychosis, one of the things that I think, would you agree,

would be fair for him to consider is that Eric's moods could change very suddenly?

A. I agree.

Q. With almost minimal or no provocation?

A. Correct.

[138] Q. For example, his best friend, Victor Meza, told us in court that Eric attempted to strangle him one time and within seconds of getting out of the car Eric's face was blank and he had no idea what had just happened, that would be something for Judge Coker to consider?

A. Yes.

Q. Another occasion was Aaron Fitzhugh, the person who threw the party in which Eric attended and hit Brandon Matje in the face, said that when he pulled Eric off Brandon, his face was confused, his eyes were blank, and he was staring right through me and it looked like he had no idea what was going on. You never considered that, did you?

A. I think I remember, if it was in the police reports I –

Q. It wasn't.

A. Okay.

Q. So you didn't consider that, and that's just days ahead of this shooting. Right?

A. I wasn't aware of that information.

Q. Okay. And then there's the incident where he – Terry Clark takes Eric to Wal-Mart to purchase a heater, and when Eric cannot find a heater in April or May at

Wal-Mart he spins on her, cusses at her, and by the time they get home, Eric is kind of dumfounded when [139] his dad confronts him about it. Those are things to consider in looking at Eric's severity of symptoms. Correct?

A. Yes.

Q. And the reason those are important is because it reflects on anyone's ability to predict violence of a schizophrenic?

A. Fair enough.

Q. You mentioned a book that you relied on, and I believe it's called Conducting Insanity Evaluations. Correct?

A. Correct.

Q. Within that book one of the criteria, one of the things they want a clinician to look at is whether or not a patient – or excuse me – a defendant has engaged in any type of prefatory behavior in getting involved in the criminal act, violent act that occurs. Right?

A. Correct.

Q. Do you recall me asking you specifically during your interview whether you believed Eric had engaged in any type of prefatory act?

A. I vaguely remember the question. I don't remember my response.

Q. Your response was, no, I don't know of any.

A. Okay.

[140] Q. Okay. Is that still your testimony today?

A. Whether I think he engaged in any prefatory acts, I would say I don't know. It's possible.

Q. All right. So when the prosecutor is asking you questions about Eric going home, getting the keys, all this other stuff, I mean, to be fair here, Doctor, you told me you had no idea whether Eric had engaged in any type of prefatory actions. Correct?

A. At that time, that's what I said.

Q. Okay. You're aware, again, because of the April 24th DUI drug arrest, that Eric – this cannot even be remotely argued – was in any way trying to contact the police. Right?

A. When he was arrested in April?

Q. Correct.

A. I agree with that.

Q. Yeah. And, yet, we know that he has pepper spray on him ready to go, knives next to him, clubs, that type of stuff. Right?

A. Yes.

Q. And I think you told me or I asked you, excuse me, the significance in your mind of Eric's circling with this loud music going on and on and on, and you told me you did not believe that that was a prefatory act either?

A. At that time I said that.

[141] Q. Okay. You were telling me the truth at the time?

A. That's what I thought at that time.

Q. Okay. And looking at the severity at the time of the shooting, a clinician would also look at post arrest behaviors. Correct?

A. I would say arrest behaviors.

Q. Post arrest behaviors?

A. I have trouble with post arrest behaviors.

Q. Well, in the book, Conducting Insanity Evaluations, one of the things they do want you to consider is post arrest behaviors. Correct?

A. Okay.

Q. Is that your understanding of how that book wants you to make the evaluation?

A. I accept that.

Q. Okay. And I note that when you were looking through the Coconino County Jail records, that you summarized some of those records that were provided to you?

A. Yes.

Q. Are you aware that within – within those records, for example, Eric would talk to himself about needing to save everyone from aliens?

A. I don't remember that.

[142] Q. All right.

THE COURT: Mr. Powell, Mr. Middlebrook is like me trying to change channels. Would you see if you can help him?

MR. POWELL: This is the blind leading the blind here.

Q. BY MR. MIDDLEBROOK: And just so that we can relate ourselves to time as to when this occurred, you can see, for example, 3rd of September, 2nd of September and the end of August –

THE COURT: Speak up a little bit, Mr. Middlebrook.

Q. BY MR. MIDDLEBROOK: We can see that this is basically the end of August, first part of September. Correct?

A. Right.

Q. And we see that – at least it's noted that on swing shift he was talking to himself about aliens, we need to save everybody from the aliens. And then on the day shift the next day it says, come help Godzilla and the boys. Aliens are taking over. I'm being held on an alien base. Most white people are aliens.

Do you see that?

A. Yes.

Q. And the one above it at the end of August, I [143] just simply – today he was very cooperative and then became hostile.

A. Okay.

Q. Okay. Thank you, Josh.

I would like – I think you reviewed Terry Clark's chronology. And right around this same time Eric told them Aaron's story where, as you know, he related that

Flagstaff's a celestial city for aliens, that basically they were everywhere and that only bullets can stop aliens. Correct? Is that what you recall of that story?

A. Yes.

Q. You were talking about looking at whether Eric ran away –

A. Yes.

Q. – from the – from the scene of this shooting. Correct?

A. Correct.

Q. Well, one thing that many witnesses have testified to on when the state was calling them was that there were some gunshots and then there was a pause and then there was some loud gunshots, apparently by Officer Moritz. Okay?

A. Okay.

Q. Do you think that it's reasonable that someone [144] who was shot at would run from the scene?

A. Yes.

Q. Okay. Also, when I was – is it fair to say that Eric running from the scene is also consistent with his theme, that aliens were infesting Flagstaff, he was running from them?

A. Might be.

Q. All right. I mean, to be fair here, we don't know?

A. We don't know.

Q. But it's certainly something that has to be considered?

A. Yes.

Q. And when we talk about when Eric is out, and I think that the prosecution has said, eluded the police, their massive manhunt, what we know from the state's case is that Eric hid in the shed, went to the bathroom in it, and as to the guns, he basically threw them down on the ground next to things that were very easily found within a few days of the shooting. You know that?

A. Yes.

Q. I mean, there was no complex scheme of hiding the murder weapon or anything like that. Do you recognize that?

A. Yes.

[145] Q. Okay. And I thought I heard on your direct testimony today, and I apologize if – or if I stand corrected, please correct me – but I thought you said that when Eric basically came walking back home, that you thought he was trying to hide the murder weapon at that time and that's why he – he ran from the police?

A. No, I don't think I said that.

Q. Okay. All right. Because you understand that the extent of him hiding out is he is out in a shed and the next thing we know, at least initially, he's kind of walking around back home; he's not trying to get out of town, he's not, you know, getting on buses, he's not doing anything like that; he comes back home?

A. Right. He's observed –

THE COURT: I'm sorry, sir?

THE WITNESS: He's observed by his house.

Q. BY MR. MIDDLEBROOK: Correct. But it's no complexity to him coming back home. Correct?

A. We don't know what was going through his mind.

Q. Yeah. And when he's thrown down on the ground, one of the things that you noted in your summary was that he makes a statement, what's this about? What are you doing? You know, why do you want to talk to me? Right?

A. Right.

[146] Q. And then we know that when he goes to the police station, that you characterized his actions at the police station as clearly disturbed?

A. Yes.

Q. And when he subsequently tells you this Sarah story, he's going – this alibi theory of his of, you know, I was at this movie theater all night, Sarah picks me up and we – and he's waiting at a bus stop, apparently, and they drive to Lake Powell that night. Right?

A. Right.

Q. Was – Eric's already got his bathing suit on?

A. Yes. He said he did.

Q. Yeah. You told me that you thought that would basically confirm the schizophrenia, his lack of insight?

A. It would seem to be an example of a profound lack of insight.

Q. I asked you during your interview – well, let me ask you this: I believe that you were asked what was Eric's motive in being involved in this shooting, and you basically said you didn't really give it much thought. Is that a fair statement?

A. I would like to amend that.

Q. Okay. But if we look at page 78 and 79 of your interview, I can tell you, that was your answer.

[147] A. Okay.

Q. Now, to be fair here, you later come back and make a little bit of clarification because you tell us, well, you know, maybe what Desiree Barreras told us about Eric saying something about F the cops, that may have had something to do with it. Does that refresh your memory?

A. Correct.

Q. I'm going to ask you that, kind of the same question as before. When you're – first of all, Desiree Barreras has not testified in this trial.

A. Okay.

Q. Okay. And so when you – did you rely on what's contained in the police reports or did you rely on her transcripts of what she told the police?

A. Again, I'd have to reference my documents to see which one I reviewed.

Q. All right. Well, let me hand you her transcript, again, a document I just received during this trial.

A. Okay.

MR. MIDDLEBROOK: And, Judge, I have a copy if you want to follow along.

THE COURT: Is there any objection? Is there any objection to the Court following along?

MR. POWELL: No, your Honor.

[148] THE COURT: Thank you.

Q. BY MR. MIDDLEBROOK: Let me hand to you what's been marked Exhibit Number 102, and why don't you just take a minute and glance through that document and see if you've ever seen it.

A. I don't think so.

Q. Yes, you did, or, no, you didn't?

A. I did not.

Q. Okay. Well, I'd like to tell you, again, I've reviewed the police reports and I understand why there may be some confusion here, because in the police reports it does not indicate that Miss Barreras talked very extensively about Clinton Ezell committing this murder, this shooting. But let's turn to her statement. I'd like to first have you turn to page 10.

A. Okay.

Q. And this – I believe this part of the statement is what you're relying on where she says, Eric said he would, shit, like fuck the cops, you know.

And that's towards the very end of that statement. Do you see that?

A. I see that.

Q. Look at line 20. Actually, what she's saying is, what did Anthony say about what Eric was making comments about the police officers, not what she heard, [149] right, of the question she was answering?

A. I mean, her response is, like Eric even made comments to everybody, you know, so –

Q. But she's asking, and what did Anthony say about Eric. Right?

A. Right, but I don't think its clear that she's referring only to Anthony but Eric talked to a lot of people.

Q. All right. Even though that was the question asked?

A. That was the question asked.

Q. All right. Turn to page 11, the very end of it: But then like after that, I was just like whatever. And that day when they had – just as they had done it, like, they waited for it to kick in and stuff, and then like he was talking all kinds of shit. He was like – he was just like, ah, yeah, fuck the cops, fuck them all, all this stuff, I'm going to kick their ass if I get pulled over. We'll see. And I'm like, what?

Right?

A. Yes.

Q. And that's what you basically attributed Eric saying?

A. Yes.

Q. Why don't we turn to page 13. He apparently [150] made those statements before he was arrested for the DUI. Are you aware of that?

A. I accept it.

Q. All right. Well, I can tell you that if we look at page 12 at the bottom, it says, they had thrown the stuff in there, so I'm sure I could get in there and find the stuff and it was about a week before he got pulled over for the DUI. Ah, yeah.

And then, actually, if you look at line two, when was – when was he making those statements? Line two says, he got pulled over like the next week for DUI.

Okay?

A. Okay.

Q. So we know that if he said this statement, that it was the week before the DUI. Right?

A. Right.

Q. And when he was being arrested or when he was arrested, the police officer walked up to him and Eric said, I've been waiting 20 minutes here for you.

Did you know that?

A. I didn't know that.

Q. On Officer Hoyt's report – you're confusing me with details – that line I have says, Mr. Clark said: I've been waiting for you to get here so you can get me [151] out. I've been waiting for 20 minutes.

A. Okay.

Q. That was his first statement to Officer Hoyt. So we know that if he said this a week before, I mean, that was his attitude towards Officer Hoyt, I've been waiting,

right? Not, F the cops; not, I'm going to do anything crazy. Right?

A. Right.

Q. And then when we're considering the reliability of Desiree Barreras because you've relied on it and she has not testified, one of the things we have to consider is that on page 13 when she's describing Eric, she says, what did they tell you about, you know, the DUI and stuff? And he was like, well, they told me if I get in trouble again, I'm going up the river and stuff. Uh-huh. So I've got to stay clean and stuff. And like I was like, well, yeah, you know. I was like, you should ask your parents to put you like in rehabilitation or something. And I was like, you know, so you don't have to go to jail. I was all, because that's going to suck. Right? He has a real gay voice. And so I don't like basically come out and say that you're going to be raped but, you know, basically that's what I told him.

Do you see that?

[152] A. Uh-huh.

THE COURT: You have to say yes or no.

THE WITNESS: Yes.

THE COURT: Thank you.

Q. BY MR. MIDDLEBROOK: And then turning to page 14, lines 13 through 16, and like I told the officer it was like there's weird things about Eric, you know. Uh-huh. Like he wasn't so much obsessed with death. And Clinton was, you know. And then she goes on, and I can tell you, talks about – looking at page 15, that Clint told me – Clint told me – and this is lines four through six at

page 15 – Clint told me, he was like fuck that. I would have shot that cop. I would have killed him. I was like, no way. Right?

Do you see that?

A. Yes.

Q. Did you consider that in your consideration that what Desiree was saying Eric said?

A. Well, the police reports had said that Clint – she said that Clint had more of an anticop attitude than Eric did.

Q. And we can see that, because further down that page, line 17 through the bottom says: This is Clint speaking. Right? Yeah, Clint. He would be like, fuck that. This cop stopped me and I'm fucking just kept [153] going. Fuck that. I'm not stopping for no cop because I have some wreckage, you know, and then I have pot. Fuck that. I have to kill him if they stop me, if they caught me. And that was like, what?

She's talking about Clint, not Eric. Right?

A. Yes.

Q. All right. Because I'd like for you to turn to page 22 of the statement that you have not considered, lines 16 through 22, and it – she never like – like when we heard or like when we both heard that, you know, this might be Eric, we both never thought it. Right? We both thought like, when we heard it was Clint, we were both like, Clint did it.

You guys were thinking more Clint than Eric?

Right, yeah, because we know Eric and we know Eric's personality.

See that?

A. Yes.

Q. All right. Let me have you turn to page 31, lines 15 through 23: And he doesn't have a girlfriend or – so who is – who is girlfriend? He doesn't have a girlfriend. He doesn't have one. No. No. Nobody would touch him honestly. Okay. No. Like I told the other [154] cop, this may sound weird, but I'm so honest when I – I said he sounds gay when we talks.

Uh-huh.

If you ever listen to him talk or you get to hear him talk.

Uh-huh.

And the other officer on the force is going to be like what? Do you think he was? Did he – was he with any men? No, he wasn't. I totally – I don't know if he was like totally was. I think maybe he was bisexual.

You didn't consider that by Desiree either. Right?

A. No.

Q. And then let's turn to her opinion as to Eric, page 41. And, actually, to be fair here, let's go – we'll start at the end of page 46. Are you with me?

A. Yes.

Q. Okay. This is Desiree Barreras. I'm going to tell the truth. I'm not going to. Right on. And what's it all

about? I'm like, if Eric did it, Eric did it, I think he's got to take responsibility for it. Yes, I think he did it, like he killed the officer. He was high. Yeah. Well, honestly, he had to be because Eric didn't have the guts. I mean, honestly, he didn't have [155] the guts. I don't even have the guts. Like one time I got pissed off at him, I pushed him and I was like, you freaking fag, get away. Uh-huh.

You didn't consider that?

A. That was in the police reports.

Q. Okay. And like if he didn't have the guts to do anything to me – lines nine through 10 – he doesn't have the guts to shoot a cop.

You didn't consider that in determining what level of psychosis Eric was suffering, did you?

A. Line nine and 10?

Q. Yeah.

A. No, I didn't consider that.

Q. Because that's not in the police reports, is it?

A. No.

Q. And, I'm sorry, but we were talking about Eric's motive and you had relied on what Desiree Barreras had said, and so I'm kind of going to have to go through that a little bit more at length. Dr. Moran, when I was asking you about what Eric's motives were in being involved in this, is it fair to state or say – excuse me – you did not tell me anything about the Thorpe Park people and what they had said?

A. I will take your word for that.

[156] Q. Okay. Let me ask you, though, are you aware, because you've reviewed numerous documents after I interviewed you – are you aware there is trial testimony that both of the people that testified as to what occurred there basically said no one took Eric seriously? Were you aware of that?

A. I don't think I saw the trial testimony.

Q. All right. But – and that wasn't my question. I'm trying to find out if the prosecution ever made you aware that no one at the park ever considered it to be serious.

A. I think this is the first I have heard that.

Q. All right. And that when Eric made this statement, everyone said he wasn't right. He was under the influence, he may have been under the influence of something. Are you aware of that?

A. Yes.

Q. Yeah. And are you also aware that they testified that Eric did not appreciate what he was saying, what effect it would have on people? Are you aware that that's what they also said?

A. No, I hadn't heard that.

Q. Okay. I can see I'm never going to get this done so I'm just going to keep going. Let's talk about some of the things that – did you consider the day [157] before the shooting – first of all, you're aware that Eric or that basically his mom reports that Eric was asleep (sic) at about 9:15 and in a good mood that day?

A. Yes.

Q. And that at least her description, as well as Dave Clark's description, was that Eric was more or less normal?

A. Yes.

Q. But they've testified what they meant by what was normal for Eric?

A. Right.

Q. And you considered that normal for Eric. Eric was certainly not normal?

A. I have considered that.

Q. Okay. And we also know that that day Terry is out trying to get him committed?

A. Yes.

Q. All right. We also know that Adam Lozano says late in the afternoon, at about 5:00 to 5:30, which would be about the same time Eric went to the athletic club, Eric – that Adam Lozano testified – he said that Eric told me he had mental problems, but he was almost incoherent in his speech. Are you aware of that?

A. I was aware that he said he had mental problems. I don't remember it being at 5:00 or 5:30. I [158] think I remember he thought he was high on something. He wasn't very coherent.

Q. Well, he told us here it was about 5:00 or 5:30, and he told us it was incoherent speech.

A. Okay.

Q. Okay. You didn't consider that?

A. I hadn't known that.

Q. Okay. When Eric went to Sizzler we have to remember he went there because he believed the food was poisoned at home. Right?

A. That's correct.

Q. And when he went to the Texaco later – or excuse me – earlier or later, I don't remember now, that he went to get bottled water or bottled drink because, again, he believed his food was poisoned at home?

A. Correct.

Q. And that he went to shower at the club because he believed the water at home was poisoned?

A. Probably so.

Q. We also know from your interview with Dave Clark that when Eric was watching the show, the Shaft show, that his eyes were kind of just wandering around on the screen. Right?

A. His father made a comment to that effect.

Q. Yeah. Did you, in reviewing documents, go [159] over the interview of Carden Hakes?

A. Again please.

Q. Have you seen the interview of Carden Hakes?

A. Carland?

Q. Carden, C-a-r-d-e-n, Hakes, H-a-k-e-s.

A. Is it in my documents?

Q. It's not.

A. No, I haven't.

Q. Police report just simply states, saw Eric at the show. That's it. Okay?

A. Okay.

Q. Carden testified – and, again, this was a transcript that was provided to me in the middle of this trial. If you need to, I'll show it to you. But do you recall seeing any transcript of an interview with Carden Hakes?

A. No, I don't.

Q. All right. He testified he did see Eric at the Harkin's Theater and saw him with his parents late at night. He thought the time was about 10:00 p.m.

A. Okay.

Q. Okay. He said he thought Eric was under the influence.

A. Okay.

Q. You did not consider that, did you?

[160] A. No.

Q. He said something didn't look right. Okay?

A. Okay.

Q. In reviewing your report – excuse me.

In reviewing your report and your outlining the facts that you considered on the day before the shooting, you mentioned the name Susan Rinck. Do you remember her name? And let me just orient you. She's the one who initially heard this loud music, this person in this truck.

A. Yes, I believe so.

Q. And she's the one who ultimately called the police, if that helps refresh your memory.

A. Okay.

Q. In review of your report, you did not put in there that Ms. Rinck believed or saw the driver at about 4:30 a.m. and he had a wild-eyed look, an evil look in his eyes.

A. That's what she said.

Q. Did you consider that?

A. Yes.

Q. Did you consider that Mike Greenway, who testified in this trial, told us the driver had a wild-eyed look?

A. Yes.

[161] Q. Okay. And then did you consider the fact that Mr. Cupp, who is the witness who remembers Eric or counting up the 21 laps, more or less, told us in trial that in viewing the driver or the person driving this truck, he saw no impairment of driving?

A. That's the first I've heard that.

Q. Okay. Because one of the things that you conclude as to why Eric could not have had a sudden and rapid decompensation is because you – and you attribute it to that if he did, that it had to be related somehow to drug use. Correct?

A. No. I think I said it had to be some stressor.

Q. Okay. But you would agree with me that there was no marijuana found in the truck?

A. Just residue.

Q. Right. That the pipe was a mixed DNA of Eric and someone else?

A. Of a female.

Q. Okay. And in reviewing the police reports as it related to the time – or excuse me – at the time of the shooting, as well as meetings with the prosecutors when they were telling you blow by blow about what occurred during the shooting –

A. Okay.

Q. – did anyone ever tell you they smelled [162] marijuana in the truck?

A. Not that I recall.

Q. Okay. Right after Eric's arrest you're aware, you viewed the videotape, of Eric sitting in an interrogation room, his hands are cuffed behind his back and he's kind of mumbling, singing to himself?

A. Yes.

Q. And I think you told me that you thought that it was clearly disturbed behavior when he – especially when he's kind of singing to himself things like, why do you have a problem with me? I mean, poison me? What the fuck does that do? Take me away. I want to go away.

A. Correct.

Q. Doctor, do you have any evidence that Eric ever had his paranoia in check, that he was able to deal with it in a rational fashion?

A. I would phrase it that he was able to deal with the world in a rational fashion to some extent, though he was paranoid.

Q. And you'd agree with me that his behaviors, as it leads up to this shooting, occurred in a meaningly fashion?

A. I'm sorry?

Q. His behavior –

A. Occurred?

[163] Q. – in a meaningful fashion. Excuse me. The symptoms of his schizophrenia are occurring in a meaningful fashion as it relates to this shooting.

A. I don't think I know what you mean by that question.

Q. All right. Well, you noted in your report when you'd made the diagnosis that Eric has paranoid schizophrenia.

A. Yes.

Q. That his behaviors were continuously escalating. Correct? Page 56.

A. Where does it say continuously escalating?

Q. I hope we have the same page numbers. First paragraph that is under discussion.

A. Uh-huh.

THE COURT: I'm sorry. Where are you referring to?

MR. MIDDLEBROOK: Page 56 under the heading discussion. And then I assume, hopefully, we're all on the same page, literally.

Q. BY MR. MIDDLEBROOK: Does the word discussion occur on line 10?

A. Yes, for me.

Q. Okay.

THE COURT: Yes.

[164] Q. BY MR. MIDDLEBROOK: Let's turn down to the very last sentence, in the year between his discharge from Aspen Hill until the shooting of Officer Moritz, the defendant's illness appears to have been on a course of gradual and continuous intensification.

A. Yes. That's what it says.

THE COURT: Counsel. I'm sorry.

MR. MIDDLEBROOK: Very last line, Judge, lines 17 through 19, and I will read that sentence again. In the year between his discharge from Aspen Hill Hospital until the shooting of Officer Moritz, the defendant's illness appears to have been on a course of gradual and continuous intensification.

THE COURT: I see it.

Q. BY MR. MIDDLEBROOK: And you told me previously that his symptoms were continuous 24 hours a day?

A. Yes.

Q. And when we're – when Judge Coker is considering the severity of symptoms Eric was suffering at the time of the shooting, would you agree with me that the following is reflective on the severity of Eric's delusional state: One, that his paranoid schizophrenia was chronic?

A. Yes.

[165] Q. Continuous?

A. Same thing.

Q. Yeah. That his voice changed to this female type voice?

A. I don't know what the meaning of that is.

Q. All right. That he went from a popular athlete to a loner?

A. Yes. That's a reflection of the presence of intensity of the disorder.

Q. Okay. That he repeatedly made statements to the effect, I can't handle it anymore. I want to go to heaven, to his mother?

A. That reflects the presence of a disorder.

Q. That his appearance changed from being a very sharp, snappy dresser to pretty odd, disheveled?

A. That reflects the presence of a disorder.

Q. He is eating and drinking only packaged food or drinking or eating out?

A. Yes.

Q. He would talk to himself at school?

A. Probably.

Q. That he would ramble to himself like a homeless man walking the street?

A. I don't remember seeing that.

Q. No, you wouldn't have because Jason Tackett [166] testified to that in court.

A. Okay.

Q. Okay. That is something to consider, though?

A. Certainly.

Q. Okay. That he had a bird in his car, strings in his car, he had weapons, which were all signs of a constant paranoia?

A. Correct.

Q. And that they are also reflective on breaks with reality?

A. Impaired reality, yes.

Q. And we don't know, nor do you, whether Eric believed Officer Moritz was an alien or not, do you?

A. Nope.

Q. But we do know Eric believed that the aliens were constantly trying to poison him?

A. Yes.

Q. That his mom and dad were aliens?

A. Yes.

Q. That the air and food and clothes that he wore were poisoned by aliens?

A. Yes.

Q. That the strings in his room, the strings in his car, the guns, the knives, the pepper spray, were devices used to protect himself against these threats?

[167] A. Appears that way.

Q. And so when we talk about Eric's theme of poisoning, we also know he has taken certain actions in an attempt to protect himself?

A. Yes, he has.

THE COURT: Counsel, we need to take our afternoon break for the court reporter. Are you just about done?

MR. MIDDLEBROOK: Judge, I am just about done.

THE COURT: Why don't you finish up?

Q. BY MR. MIDDLEBROOK: I take that back. I just remembered I have to cover Eric's statements with him that I haven't been able to.

THE COURT: All right. We'll take a brief recess this afternoon. Thank you, everyone.

MR. MIDDLEBROOK: Thank you, Judge.

(Whereupon, a recess was had from 3:13 p.m. to 3:40 p.m.)

THE COURT: Counsel, you may proceed.

MR. MIDDLEBROOK: Thank you.

Q. BY MR. MIDDLEBROOK: Dr. Moran, if you'd turn to page 35 of your report.

A. Okay.

Q. And is that the report that we were just [168] discussing?

A. Yes.

Q. Yeah. I think when we kind of got side-tracked, and what I was asking you while you were interviewing Eric, some of the statements that he made and I think that you were concerned at the point when I asked you whether Eric made the following statements, and that was that you asked him at line 23, page 35: Are there memories of specific times you thought someone was out to get you? And his response was: I'd feel my clothes and they didn't feel clean. I felt they were poisoned. I opened the door to the car, it seemed like a poison there. I'd be breathing the air and it did not seem clean, so I thought the aliens were trying to kill me a lot.

Do you see that?

A. I know that he said that to me, but I still am not on the same report that you have, so is there another copy?

THE COURT: Right here.

THE WITNESS: Okay.

THE COURT: Page 35.

THE WITNESS: Yes, I see it now. Thank you.

Q. BY MR. MIDDLEBROOK: And, if you recall – I [169] won't reference pages. Maybe we'll go through this a little faster.

Do you recall also in your discussions with Eric when he was talking to you about aliens that they basically can read your thoughts because they can know whether you're moving from the right side of your brain to the left side of your brain?

A. Yes, he said that.

Q. And he believes they're still doing research on Jupiter and Mars?

A. Yes.

Q. And he believes that aliens can put thoughts in people's heads but they have not done it to him?

A. Correct.

Q. We know that Eric's schizophrenia was symptomatic enough that immediately prior to this shooting that he was carrying weapons. Correct?

A. Yes.

Q. That he was wearing layered clothing?

A. Yes.

Q. That he believed nearly everyone was an alien?

A. I don't remember when he last said that.

Q. In Flagstaff, he believed nearly everybody in Flagstaff were aliens?

A. I think that was the generalized belief he [170] had.

Q. He believed that his air, his food and his clothes were poisoned by aliens?

A. Yes.

Q. We know that statements at the police station after his arrest are bizarre?

A. Yes.

Q. We know that he was delusional as he drove around and listened to this loud, pounding music?

A. His delusions were present then, yes.

Q. Yeah. Do you think that that was for the purpose of drowning out voices in his head?

A. That's one theory. Well, actually, that was the theory that was – I think his mother expressed about why he kept the television so loud.

Q. And your experience with schizophrenics are, they often turn up TVs loud, radios loud to drown out the voices?

A. I have encountered that.

Q. And we know that after the movie, Shaft, that – and, by the way, Shaft – in Shaft, it's a movie where some of the police officers are pretty evil guys and they end up getting shot and killed. Right?

A. Right.

Q. We know that from that moment to when Ms. [171] Rinck and Mr. Greenway see Eric, that whatever

stressor it was, it caused him to have a wild-eyed look. Right?

A. Right.

Q. Doctor, would you – you've had the opportunity to observe people who Haldol is one of the affects making them extremely drowsy?

A. Yes.

Q. Like Eric sleeping in court today?

A. I can't see him, but if he is, that might be an example.

Q. That's all the questions I have. Thank you very much, Doctor.

THE COURT: Thank you, Mr. Middlebrook. Mr. Powell.

REDIRECT EXAMINATION

BY MR. POWELL:

Q. Doctor, we've been here for quite a while today. I'd like to summarize three hours of some testimony in about two minutes if we can. Okay?

A. Okay.

Q. You don't dispute that the defendant is psychotic?

A. Correct.

Q. He was psychotic before the murder of Officer Moritz?

[172] A. Yes.

Q. Could have been psychotic at the time of the murder of Officer Moritz?

A. Yes.

Q. You don't deny or challenge the fact that actually his psychosis is schizophrenia?

A. Yes.

Q. And, again, before, during, after?

A. Yes.

Q. It was the paranoid type?

A. Yes.

Q. It was chronic?

A. Yes.

Q. Meaning continuing?

A. Yes.

Q. It was progressive to a certain extent?

A. Yes.

Q. And I believe your opinion is that its inception was sometime around 1999?

A. Yes.

Q. And the defendant may very well believe in aliens?

A. Yes.

Q. We don't dispute that?

A. No.

[173] Q. That the defendant may very well believe his parents were or may be aliens, you don't dispute that?

A. Correct.

Q. That he may be afraid of being poisoned by the aliens?

A. Correct.

Q. And just stopping there, conceding this, is it your opinion the defendant knew what he was doing was wrong at the time he killed Officer Moritz?

A. Yes.

Q. Why?

A. Because he – again, I'm looking at the information that's available to me, and that information is going to include the reports of his associates; I suppose it includes the possibility of a motivation in the shoot the cops attitude; the antisocial friends that he was hanging around with; that his behavior on that day, the last that we know of it, he was clearly able to navigate and negotiate with the world in a rational manner, even though underneath of that he did have a delusional disorder, but at the last that we know of he was rational, he was able to navigate the world; that we don't know of any specific stressor between then and the time that he shot Officer Moritz, certainly there's maybe an endless number of possibilities that exist there; but [174] we know then after he shot Officer Moritz, that he left the scene in a hurried fashion; he secluded himself, apparently trying to hide from the police; that he made some attempt to try to hide the murder weapon; and

that when he came out, he made some attempt – when he was spotted, he made some attempt to elude the police and, to some extent, was mildly resistant to their arrest.

And, so, while I certainly recognize that Mr. Clark has paranoid schizophrenia and that it existed before the disorder and after the disorder, that it seems to me, though, that the facts that we have, and emphasizing the facts, if you stick as closely as you can to them to construct your conclusion and that led him that direction, that he apparently was rational or rational enough at the time that he pulled the trigger that he was able to comprehend that his act was wrong; and, therefore, he took evasive action or strategic action, goal-directed action, engaged in the other kind of behaviors that would indicate psychologically he was intact enough that he could pay attention, he could concentrate, he could evaluate, he could select options, he could pursue options and pursue a goal, which was to elude the police. And those things go along with rational behavior, not with psychotically-driven behavior.

[175] Q. Now, I think we're all in agreement that no one knows what was going through the defendant's head at the time of the murder. Correct?

A. That's correct.

Q. And you have seen Dr. Morenz's report and he agrees with that?

A. Yes.

Q. Now, we also don't know of any stressors, do we?

A. Other than being pulled over by the police.

Q. If that is someone's ultimate goal, is that a stressor?

A. No.

Q. Now, everything we've gone over, I want to kind of give you that litany at the beginning, would you be willing to say that you feel that the illness suffered by the defendant satisfies the first prong of the insanity test?

A. Yeah, I believe it does.

Q. But it's your opinion it does not satisfy the second for reasons you've told us?

A. That's correct.

Q. For someone to opine, say, an expert to opine that the defendant did not know what he did was wrong, would that individual have to imply or infer things that [176] are just not known in this case?

A. I believe so.

THE COURT: Counsel, I'm not sure I understand what you're asking there. Would you ask that again please?

MR. POWELL: Sure, Judge.

THE COURT: Thank you.

MR. POWELL: Let me just go back, try and clean it up a little bit.

THE COURT: It may be clean enough, but I just didn't process it.

MR. POWELL: It's late in the day.

Q. BY MR. POWELL: Knowing what we know now, factually, of the events of June 20th and June 21st of 2000, surrounding the murder of Officer Moritz, is it your opinion that if a mental health expert were to opine that the defendant did not know what he did was wrong when he killed the officer, would that individual be speculating, would that expert be speculating or inferring things that cannot be known?

A. I think that it would be –

MR. MIDDLEBROOK: Objection. Excuse me, Doctor, I have to object as to relevancy of this. I have not gone into Dr. Morenz's report on cross-examination or any of the other doctors, so I'm not sure why we are [177] getting this question.

THE COURT: I think it's appropriate.

Go ahead. You can answer the question.

THE WITNESS: I think that the critical task is to tie the mental illness to the behavior. And, so, to do that, you would have to assume in this case that the schizophrenia, the paranoid delusions were the motivating and necessary and sufficient cause of Eric's behavior.

Q. BY MR. POWELL: And you'd have to infer that that was the cause of the wild-eyed look –

A. Yes.

Q. – that's been reported?

A. That's correct.

Q. And that there was a stressor that we don't know of any of at this point?

A. That's correct.

Q. These would all be inferences that would have to be made?

A. I believe so.

Q. You ruled out drug abuse as a primary cause of the mental problem of the activities. Correct?

A. Correct.

Q. How about as a contributing – a potential contributing factor?

[178] A. It may have been a contributing factor.

Q. And why do you say that?

A. Well, the brain is adversely affected by marijuana and by alcohol. And, so, to the extent that Eric was putting THC and alcohol into his brain, he was compromising even further the functioning that had already been compromised by the schizophrenia.

Q. And that would have been as a result of acute use?

A. Yes.

Q. The defendant only recently talked to anyone about his version of what happened that early morning, correct, to the best of your knowledge?

A. Yes.

Q. Is schizophrenia paranoid type associated with any type of memory loss?

A. Not of global memory loss, no.

Q. During cross-examination there was some discussion on events leading up – and I'm trying to think of the language that was used. It wasn't premeditation but preceding events. And it seems that you had perhaps changed your opinion on some of those – some of those events.

A. Yes.

Q. Could you please explain?

[179] A. I think it was that in the interview I was asked whether he had engaged in planned for behavior. And, at this point, I think I conclude –

THE COURT: Did or did not?

THE WITNESS: He did engage in planned behavior. That may have been as minimal as getting out of the car and pulling the trigger. But I think that he was rationally making a choice to kill the policeman; and, therefore, by definition, he engaged in planned behavior.

Q. BY MR. POWELL: Would you factor in the factor that the defendant fired multiple shots into that equation, also?

A. That would tend to support that.

Q. During your conversations with the defendant, did you bring up the topic of aliens or did the defendant bring up the topic?

A. He brought it up.

Q. Did the defendant tell you anything about the Aaron story that we talked about earlier?

A. No, that wasn't –

Q. But he told you many other items about aliens?

A. Yes.

Q. And his concerns of aliens?

A. Yes.

[180] Q. From your review of the complete file here, when was the first mention that you can recall of aliens by the defendant to anyone?

A. I believe it was, he mentioned it to his mother. And I'd have to say, I don't have an independent recollection of it, but I remember that Mr. Middlebrook put it at April of '99.

Q. And, Doctor, what I'm going to do now, just to kind of put you on notice is, I'm just going to go down my notes of cross-examination, so this may be a little disjointed and I'm just going to go down through things I want to try and clear up.

A. Okay.

Q. Do you feel that you strategized with any of the prosecutors in this case?

A. No, I do not.

Q. Sometimes attorneys, particularly prosecutors, need to be educated on mental health issues of a sophisticated case, don't they?

A. Yes, they do.

Q. And is not part of your job as a professional to educate the prosecutors?

A. Yes, it is.

Q. Or the defense attorneys, if that's who you're working with?

[181] A. That's correct.

Q. Did we have any input, other than providing the information to you, with results to your conclusions contained in your reports?

A. No.

Q. Would it be fair to say we did talk to you about trial preparation to let you know which areas we were going to go into?

A. Yes.

Q. And what your proposed answers would be?

A. Yes.

Q. And we asked you if you had any suggestions to make it clearer for the Court?

[A.] Right.

Q. You said you were – you've never been hired by the defense as an expert regarding sanity. There are times, in fact, you have been hired by the state and you have ended up testifying for the defense or opining against the state's position?

A. Yes. There was actually a case here in Flagstaff where I was asked to render an opinion by you and, in that case, the defense expert concluded that the defendant was sane and I concluded he was insane.

Q. And I have never forgiven you for that, long, long ago. So there are times when you're retained by one [182]

side or by the state and you go in, do you still maintain an objective position?

A. Yes.

Q. What was your purpose of meeting with Dr. Potts?

A. Just – well, there was this complex case with a lot of unusual features to it, and I wanted to get his perspective of some of those features.

Q. Was one of the primary things you talked about the legal definition of insanity in Arizona?

A. We talked about that. I don't remember that as being a primary consideration.

Q. When you were questioned by Mr. Middlebrook at your office a couple months ago, we've gone over one of the statements you said to him about the definition of insanity.

A. Okay.

Q. Do you recall that this morning?

A. Yes, I do.

Q. Earlier in the conversation with him did you also cite as controlling the actual statute, the 13-502?

A. Yes, I did.

Q. So that was – 13-502 was in addition to the gross impairment of reality?

A. Yes.

[183] Q. And was that further explanation of the actual statute itself?

A. I think that it was. I think that it may even have been referring to the fact that in the DSM-IV, that they refer to psychosis as any impairment in reality, which seems to me to be a very broad and unproductive definition, but that's what's in the book.

Q. You were asked on cross-examination if it was, I think, reliable, the defendant's behavior, eight hours before the murder, and I believe you said it was significant.

A. Yes.

Q. Would you agree with that?

A. Yes. I think that the question – one way of asking the question is whether there was any correlation between one's behavior eight hours before and eight hours later. Certainly, my position would be that even though Eric has schizophrenia, that there should be some correlation.

Q. There was some talk about the defendant being assaultive at times, and then the way he was characterized in court today, not remembering what happened, and Brian (sic) Matje was one of those that was brought forward today. Now, you recall that on the day preceding the murder he did have quite a vivid recall on [184] Brian Matje, did he not?

A. Yes.

Q. And that was from approximately a week beforehand?

A. Yes.

Q. So if people would say he looked at them after the assault with a blank look, like he didn't know what happened, that would be a wrong assumption on their part?

A. I believe it was.

Q. Do you think the mechanics of the shooting, as it was asked on cross-examination, are important to your determination here as an expert?

A. Yes, they are.

Q. And why is that?

A. Well, because it's part of the actual fact pattern that's available for drawing a conclusion about what his mental state was at the time.

Q. I believe next we spoke about – or you spoke about the GAF scale or rating, and you gave him a 31. And, again, at what period of time was this reflective of?

A. Up and at the time of the shooting. Let me correct that. When I originally gave him that assignment, I meant to say that the last that we know of him, he was functioning at that level when his parents [185] left the movie theater. And the way that I'm using the GAF scale is to try and provide some gauge of how much of a change would have had to have occurred between the time that he left the movie theater and when he shot Officer Moritz.

Q. So it would be reflective of when his parents left him at the theater?

A. Right.

Q. And we don't have any information about drug or alcohol use. The defense has not provided any. And we have no information about stressors?

A. No. So there's two different theories. One theory could be he went out and he got loaded and his GAF went down to a 25 and he shot Officer Moritz. Another theory could be that, for whatever reasons, the schizophrenia was exacerbated, his paranoia overtook him in a way that it never had, and his GAF pummeled down to a five or a one. We don't know.

Q. Well, that's interesting you say paranoia overtook him as it never had before. What do you mean by that?

A. Well, he – obviously, shooting a police officer is a gross isolation of symptomatic behavior of whatever it's a symptom of, and so he had never demonstrated anything akin to that. In fact – well, he [186] just hasn't.

Q. Okay. So up until then, we have a guy punched in the nose and some people threatened?

A. Right.

Q. And you are – you agree that – let me make sure I get this right, so tell me if I'm correct. The Aspen Hill GAF rating was 30?

A. Yes.

Q. The Title 36 was 31, if you recall?

A. Dr. Everley's?

MR. MIDDLEBROOK: Title 36 was 20.

THE WITNESS: 20, yeah.

Q. BY MR. POWELL: I'm sorry. Have to move down a couple lines. GAF was 20. And then the ASH was 31?

A. Yes.

Q. And Dr. Everley's, the GAF would have been after defendant had been arrested and in custody for over two months?

A. Well, one of the – that's correct. And, of course, Mr. Clark stopped eating and drinking almost immediately upon being taken into custody. And, so, within 24 hours he did have a medical condition impacting his psychiatric status. And, so, his post behavior – his post arrest behavior and its understanding of that was complicated by his hunger strike and his refusal to [187] take fluids.

Q. And that would have been reflective to the Title 36 GAF score?

A. That's correct.

Q. And when at Aspen Hills, there was no such problem such as that, and their ranking was a 30?

A. Correct. I guess I should clarify, too, he wasn't on a hunger strike. He simply stopped eating.

Q. There were certain areas pointed out by counsel regarding the lower levels on the GAF, and one was that the defendant had no jobs or friends. Now, do you agree with that assessment completely?

A. I agree. I certainly gave consideration to those things and I used those examples listed in the GAF as a reference point by you to fix my assessment. And so I

think that, though, you know, he was still functioning among his friends, he was still going out with his friends and he didn't have a job, but I think the fact that he was 17 and he had employment at home is sort of mitigating around that. So I gave those things consideration when I gave him the rating of 31.

Q. Did you take your evaluation seriously?

A. Very.

Q. And would you – would it be fair to say that your evaluation was done before you knew what the other [188] GAF evaluations had been at other times?

A. That's correct.

Q. As you sit here today, after cross-examination and some introspection, do you agree or disagree with your evaluation of 31 GAF?

A. I agree with it.

Q. It's been pointed out that the defendant, when he was arrested for DUI, was not aggressive to the police officer. Now, your understanding of that incident, was he pulled over by that police officer?

A. No, he wasn't.

Q. What is your understanding as to the situation when the officer arrived?

A. Well, that he had wrecked his car and his car was sitting on the side of the road disabled and he had been there for 20 minutes, I guess, when the officer arrived.

Q. Could that account for the comments to the officer, I've been waiting for 20 minutes for you?

A. Yes.

Q. And we've been told that was on Oak Creek somewhat of a busier road than, I would imagine, Gillenwater Street would have been at 4:50 in the morning. Would you think that would account for any other reasons that the defendant may not have been [189] aggressive if he would have chosen to do so?

MR. MIDDLEBROOK: Objection, speculation.

THE COURT: He is allowed to give his opinion on that. Overruled.

THE WITNESS: Could you rephrase that please?

Q. BY MR. POWELL: Do you think there is a factor in the fact – when the DPS officer comes to him by Oak Creek, that's on a busy traveled road, cars going by, daytime, in contrast to the Gillenwater murder was at 4:50 in the morning, we assume not many cars going by, in a quiet neighborhood, would you like to comment now on the things that have been said the defendant was not aggressive towards the DPS officer, yet, he killed the Flagstaff police officer? Would you like to comment on that?

A. That would be a disinhibition against acts of violence. I'm talking inhibition, not disinhibition.

Q. And there – when the defendant was arrested, there actually was a bit of confrontation with the DPS officer, wasn't there?

A. Yes.

Q. Could you explain to the Court what you recall that being?

A. They told him to stop and he didn't and, [190] eventually, the laser was – apparently, he saw a laser on his chest and chose at that point to stop. They told him to raise his hands over his head, which he did, and they told him to get down on his knees, which I believe he did, and they told him to get down on his stomach and he refused and they forced him, and they said to put his hands behind his back and he refused so they had to forcefully do that.

Q. I'm sorry. I may not have been clear. I was addressing the DPS officer at Oak Creek Canyon, if there was some type of physical confrontation there, if you're aware of it.

A. Yes. He apparently tried to crawl out a small window. I never got it straight in my mind if it was a window between the back seat and the driver's seat or at the side of car, but he was crawling out, and then the officer had to restrain him to force him back in and to, I guess, secure him in some way.

Q. And this was after he had been placed under arrest?

A. Yes.

Q. As far as you know, did the defendant ever make any suicide attempts?

A. No gestures, no.

Q. Even a token gesture?

[191] A. No, not that I'm aware of.

Q. And is that an important issue to be factored into GAF scoring?

A. Yes. There is a difference between suicidal ideas and suicidal behavior.

Q. I may be confused here, but I think at one point you had said you didn't think the circling behavior in the neighborhood of University Heights was prefatory conduct. Do you agree with that today?

A. Yes. I think that I wouldn't agree with that. I think that the theory that has the most support in my mind is that he enticed the cop and so he was provoking a police action. As I have said before, the alternative theory is that he was in a paranoid state and so forth. We don't know which of those two is true, but my position is, it's more likely and more probable that he intended to shoot the cop.

Q. And what is that based upon?

A. As I have said before, you know, the day that we have, whether it's the fact that he said – allegedly said that he was going to shoot the cops if he was pulled over again, the fact that he seemed to be doing okay that night, and then – and then the circumstances surrounding his taking evasive action.

Q. Now, you agreed with counsel on a couple of [192] occasions during cross-examination and I'd like to look into this. You agreed that the defendant commonly carried a gun up until this event. And I don't quite recall that. Could you please explain where you get that information?

A. I suppose the only information I have about – well, I have information about weapons, about the pepper spray and special forces knife and so forth at Oak Creek Canyon in April. Then I suppose the next thing is his parents finding him with the gun in May. And that maybe – that is my first recollection of a gun. There was also mention of a machete he kept under his pillow at one point. But the first mention of the gun is in May.

Q. So, as you sit here today, is the time the gun was found by the parents with him in his room, is that the only other time you recall him having possession of a handgun of any sort?

A. Yes.

Q. Do you recall any reports of him carrying a weapon of any sorts, a handgun, up until June 21st?

A. No. I mean, I remember some things, that his parents – his dad used to enjoy target shooting and some things like that. There may have been some mention by the associates, but I don't recall specific identification that he was carrying a gun.

[193] Q. You were asked about motive. If we've gone over this, please tell me. But you were asked about motive, and you said at the time of the defense interview you hadn't give it much thought, but you'd like to amend that.

A. Yes.

Q. Would you like to do that at this time?

A. Yes, I would. I certainly gave a lot of thought to the motives and whether or not it was his behaviors driven by a psychiatric illness or whether it was driven

by something else, and I think I made that statement in the defense interview because I felt like I didn't want to get caught into a discussion about theories because I don't think that that's the level at which this case should be, you know – I wanted to formulate my opinion. I want to formulate my opinion as close to the facts as I can. But, given that I believe that he was rational at that time, he had to have a motive. And so I believe that his motive was either to avoid being – probably to avoid being apprehended at that time.

Q. And is that based partially on the statements made by Desiree Barreras?

A. Yes, partially by those, partially by the ones of Eric. I suppose a second explanation would be he was [194] doing it because he was executing his adolescent bravado in some state of extreme intoxication, of what nature, we don't know.

Q. Going back to the GAF, is there any significance that the defendant was seen at a teen night night club, place up here, the Sunday before the shooting, in light of the fact the shooting was on Wednesday?

A. Yes, there was. I think that that, again, shows that he had some desire to associate with people.

Q. And I believe of the testimony and it was your understanding – and I want to make sure this is what you considered – Mr. Lozano spoke with the defendant on the 20th. And in the report, as I think you stated, he felt he was under the influence of some type of alcohol or drugs, did he not?

A. That's what he stated, yes.

Q. Does schizophrenia paranoid type commonly make someone's voice change?

A. No.

Q. Can schizophrenia somehow mimic – can't think of the word, Judge – the appearance of someone on marijuana?

A. No.

Q. Alcohol?

[195] A. Not really.

Q. The fact that Mr. Lozano spoke to the defendant shortly before he went to the movie and Mr. Hakes, who saw the defendant at the movie, each said he had the appearance of looking high. And I believe, I could be wrong – I believe Mr. Hakes said it was something beyond alcohol. They may have both said that. Does that make you have any thoughts about the defendant's condition at that time?

A. I don't think it sheds very much light on his professional opinion on his mental state.

Q. How is that?

A. Well, they're not professionals, and so what that means when they say that, I have very little idea.

Q. There was some questions asked of you if the defendant would have had the ability to do a complicated task. And I don't know how you define a complicated task. Let me just ask you, what would your opinion be if you would have had the ability to do that in June of 2000?

A. Well, I think that all hinges on how you define complicated task. If it would have been to come up and fix the AV equipment on that day, I don't know, maybe he could have. If it had been to operate a complicated piece of machinery for the first time – [196] maybe that was the same example – but he probably couldn't have. I suppose it would be because there was a generalization between teens and stereo players and stuff like that, he might have been able to figure it out.

Q. In interviewing his mother, she did tell you about the elaborate booby traps or security systems that he arranged both in his home, actually in two rooms in his home, his own bedroom, the computer room and in his car?

A. Correct.

Q. Do you recall those?

A. Yes.

Q. And did she describe those as fairly complex tasks; again, not knowing what our definition of complex is, something that took some –

A. They were fairly elaborate.

Q. Is that how she described it to you?

A. Yes.

Q. And that those tasks, that was right up – basically, up until the day before the murder, as far as you know?

A. Yes, I believe up to that time. For example, he was capable of doing some cleaning around the house. He

didn't do a great job, apparently. He was doing his [197] laundry.

Q. That's right. Okay.

MR. POWELL: Could I have a moment, your Honor?

THE COURT: Certainly.

MR. POWELL: Doctor, I think that's all I have. Thank you.

Thank you, Judge.

THE COURT: Thank you, counsel. Counsel, just before I release the Doctor, do I have a copy of the GAF categories that were being shown on the thing? I think I did, but I don't know what exhibit it was.

MR. POWELL: It's in the Doctor's report, Judge.

THE COURT: The one that I have?

MR. POWELL: Yeah.

THE COURT: Which report?

MR. MIDDLEBROOK: It's in – well, truly, but it's – it should be in about page 50, 50 through 60, he's got the exact scale verbatim.

THE WITNESS: Page 50 and 51.

MR. POWELL: And, Judge, we could run you a copy of the DSM.

MR. MIDDLEBROOK: Or we can simply give you the scale that I've been using, Judge, just to make it [198] easier to reference you by.

THE COURT: If it's in here, I just want to make sure I have it. 50 and 51?

THE WITNESS: Yes.

MR. POWELL: At least on one copy.

MR. MIDDLEBROOK: On one of them.

THE COURT: Yes, it is. I will mark it here.

Doctor, I have a question before you step down. There's been quite a bit of testimony from both of the experts about this condition of schizophrenia. And I do a lot of the Title 36 work here in the county and I want to make sure that I'm not sort of blending things a little bit. I recall a doctor/psychologist/psychiatrist telling me one time that with some mental illnesses there is a progression, and that once they have – they go off their meds, it sometimes gets harder to bring them back to a baseline that they were on before they were – before they were off their meds. And I'm wondering, is this one of those diseases?

THE WITNESS: Yes.

THE COURT: In that vein, you mentioned stressors and you also mentioned that it was – this disease was progressive.

THE WITNESS: To an extent, yes.

[199] THE COURT: But that stressors can aggravate it.

THE WITNESS: Yes.

THE COURT: Is that correct?

THE WITNESS: Yes.

THE COURT: Okay. I'm being asked to take a look at a lot of things that have happened since his arrest and try to ascertain his mental state at the time of the shooting.

THE WITNESS: Right.

THE COURT: And I'd like to hear your comments or just if you would discuss with me what you feel the stress of the shooting, running from the police, hiding from the police, the arrest, the incarceration, to what extent does that affect how he is today or how he then subsequently became? I'm trying to get a handle on that. If there's no relation, fine; if there is some relation, I'd like you to talk about that.

THE WITNESS: Uh-huh. Well, certainly, you couldn't give him much more of a stressor than to have him in a courtroom with a murder charge. Let me begin by saying that what progressive means in my mind is that the disorder would develop up to a point and then the person would typically plateau at that point. It's not progressive in the sense that cancer is progressive [200] and it will just keep getting worse. It's, rather, they hit a particular level of functioning. In fact, one way of understanding that is that the GAF is sometimes used to say they were at this level of function premorbid, therefore, we expect them to get back to that level premorbid, but that does not apply to onset of schizophrenia. So it's more like if he was at a level on GAF when he was taking medications, then he stopped taking medications and dropped back down, the hope would be we could get him back to the level he was when he took the medication.

In terms of how Eric would be doing if this hadn't happened, you know, we don't know. We know that he said for one of the first times shortly before the shooting to a friend, I have a problem with my mind, so maybe he was getting close to accepting some help. He could have gone through a long period of accepting help, rejecting, accepting, rejecting, go on and off medications, that's a fairly common thing for these kinds of problems. So I'm afraid it's really hard to take those apart. I don't have much clarity about that.

THE COURT: Is his present condition, is that – the condition that he was found when he went to the state hospital on incompetency and all that, could that have been affected by the stressors of the shooting [201] and the arrest?

THE WITNESS: It could have been one way of looking at it. When he was arrested and when he was viewed on the videotapes in the interrogation room, he was at a higher level of functioning at that time than he was at Madison Street Jail when he's defecating in public and masturbating in public. So if he didn't have to go through four hospitalizations for food deprivation and starvation and all of those stressors on his body, would he have ended up at that same level? I don't think so. He probably – I think his family probably would have been able to keep him at a higher level of functioning. They probably would have gotten the courts involved. The courts probably would have had him institutionalized against his wishes because he was a danger to himself. And, hopefully, some higher level of functioning could have been preserved.

THE COURT: Okay. Thank you very much, Doctor. Appreciate your comments.

THE WITNESS: Thanks.

THE COURT: Counsel, do we have any other witnesses that either side is going to be calling?

MR. MIDDLEBROOK: No, your Honor, based on – I should say, based on the fact that we've reached the agreements that Jason Tackett won't testify based on

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR THE COUNTY OF COCONINO

STATE OF ARIZONA, Plaintiff, vs. ERIC MICHAEL CLARK, Defendant.	)	Case No. CR 2000-538

REPORTER'S TRANSCRIPT OF
BENCH TRIAL PROCEEDINGS
DAY 11

August 27, 2003
9:00 o'clock a.m.
Flagstaff, Arizona

BEFORE: HONORABLE H. JEFFREY COKER
Judge of the Superior Court

PREPARED FOR: THE DEFENDANT (Certified Copy)

* * *

[6] On that note, Mr. Middlebrook, you may begin your presentation on closing.

[7] MR. MIDDLEBROOK: Thank you, Judge.

You've heard a lot of evidence, and the question's going to be, did this person shoot Officer Moritz or did something intervene that was so prevalent and so disturbing that it caused a person to suffer a gross impairment of reality. That's really the question.

We know that most mental health professionals use the gross impairment of reality as a standard, and we also

know that 13-502 really doesn't tell us not to use that. It says, you look at the severity to determine whether a defendant would know what they were doing was wrong. Well, obviously, if that's the case, they had to have suffered a gross impairment of reality, and that simple definition is the one that is most reflective of what happened with Eric.

This particular picture I just showed you many, many, many people have testified would have never have been involved in this. When we talk about schizophrenia as it relates to Eric, we've had two doctors who have come in and testified as to their expertise in the diagnosis of schizophrenics. We know that – I know that as you review those reports, a question that you have to ask yourself is, what is the objectivity of the doctor rendering the opinion? Is it a doctor that has been used by both sides, the state and [8] the defense when he has rendered an opinion, or is it a doctor that has only been used by one side? Is it a doctor that has educated medical students as to the ethics of forensics evaluations or is it a doctor that strategizes with the state in setting up an opinion and then eventually rendering one?

MR. POWELL: Objection, misstatement of the evidence, your Honor. That was denied.

THE COURT: Counsel, I will take it for what it's worth. It's closing.

MR. MIDDLEBROOK: We know that Dr. Moran has, prior to writing his report, consulted with Jack Potts, who is a consultant for the state. We know that prior to the opinions ever being rendered by Moran, that he had created a document setting out the strategy, not that he created it but his assistant did, and he relied on it. So it's not surprising, Judge, when one doctor talks to us about

there being considerable evidence that Eric suffered a psychosis so prevalent, so continuous, so chronic that he could not understand or could appreciate what he was doing was wrong. That doctor has told us to even a reasonable degree of medical certainty that Eric was grossly impaired. That's what he's telling us.

Another time when you're reading these reports you have to recognize, what is the doctor relying [9] on? Is the doctor relying on reliable evidence or has the doctor been misinformed or not told the complete truth as to what was really occurring, not only at the time of the shooting, the day of the shooting, but before that? And we know doctor – and we know, Judge, because we spent yesterday with Dr. Moran, really Dr. Moran, on some really good evidence, had half a picture and, yet, we know Dr. Moran still, nevertheless, rendered an opinion that Eric's schizophrenia – that Eric is schizophrenic, is schizophrenic, that he's paranoid, that he was psychotic at the time of the shooting, and that his highest level of functioning was still very, very low, at a 31, and that's Dr. Moran's analysis. And, yet, we know that Dr. Moran did not consider Carden Hakes's testimony as to what Eric looked like at Harkin's Theater. We know he did not consider Nicole Benally's statements that she had not dated Eric several weeks before, in which he said was significant in finding what severity of symptoms he believed Eric was suffering. In fact, she had dated him over a year before and at that time was very suicidal, talking about slitting his throat with a knife.

We also know that Dr. Moran relied on Desiree Barreras but did not consider that Miss Barreras, when you read her account, was told by someone else what [10] Eric said, and had not considered that Desiree said this fricking guy doesn't have the guts to shoot a cop.

Dr. Morenz has told you that he believed that on the day of the shooting, if we're talking about the GAF score, that Eric would have been lower and should have been lowered. And I think, fairly, Dr. Moran has to consider that his level of function was a lot lower. He had not considered any of the evidence. And I noticed on redirect Mr. Powell never asked him to reconsider, in light of the evidence that came out on cross-examination, as to whether that would change his opinion.

Now, I'll be straight with you. It wouldn't have changed his opinion because he was brought in by the state to render only one opinion.

Judge, when we talk one of the questions, and I know that will be argued by the state was, you know, did Eric set up this ice cold ambush or was it simply a coincidence that Eric had made statements at Thorpe Park ranting and raving about killing police officers or was there an ice cold plan as the state has characterized in their opening statement. You've had a lot of evidence presented about Eric's cognitive abilities, and we know that schizophrenics have impaired cognitive abilities, but let me show you a picture, several pictures, I believe, that will demonstrate quite [11] clearly what Eric's cognitive abilities were. I might just be able to – Judge, these pictures were taken on the day of the shooting. This is Eric's room. And we know that in the 10th grade Eric went from testing above grade level, cognitively, to about the 4th or 5th grade level. Is this more reflective of that, that he is still functioning at that level, 4th or 5th grade?

And just another quick picture, these are photos in his room. And as you go through the defense notebook, you're going to see the Disney mermaid photo, the Austin Powers

photo, Poke'mon, are these more reflective of a grade school mentality? These are what Eric put around his room when no one was looking, when no one had any reason to doubt that Eric was trying to set up a plan or anything like that. That's Eric's ability to plan. That's it.

So we know that we're talking about 4th and 5th grade level. And that's what Dr. Moran considers as on a high day right before the shooting, on a good day for Eric.

We also have to look at some other elements of schizophrenia and what the sufferers go through. We know that their appearance completely changes. And if there's any doubt of that, this is a photo taken roughly six months after the shooting. But [12] we know that Eric went from this bright, clear-eyed student to this, for one reason, because schizophrenia had spread its spider webs into his mind so deeply and so grossly that it completely changed who Eric was. And how many witnesses have told us, have told us repeatedly, that was not Eric, that's not my son, that's not my brother?

In our system of justice, we punish people who do things that are wrong, who have malice, who have an ice cold heart. Yet, here, we have Lois Wells through Victor Meza through the other witnesses tell us, Eric was a warm and loving child, a warm and loving friend, a kid that would bring in other people into the group before he changed.

A question you have to ask yourself as you review all this evidence is, where is the evidence of Eric's ice cold heart? Judge, we know that paranoid schizophrenics in particular suffer from persecutory delusions, they're out to get me. These are classic symptoms. And when we're talking generically with both Dr. Morenz and Dr. Moran

about the delusions that schizophrenics suffer, here we know that Eric's, the depth of his delusions were, when he woke up in the morning he was breathing poisoned air, the food he ate was potentially poisoned, the water he drank was [13] poisoned, he had to have packaged foods, go places where aliens had to feed everybody so that he could not be poisoned, the clothes he wore was poisoned.

When Eric was attending a party, senior ditch day, we know he at that time was so paranoid – he was going to go with friends. He was going to be with friends – by the way, by then he almost had none – but he was going to socialize, as were going to hear from the state, that he was socializing. Well, what was he doing? He was socializing. Let's see, he was laying in a creek, completely gone, everybody's told us that about senior ditch day. And, yet, the only reliable evidence the state's presented and I presented was Mr. Carrillo who said, Eric didn't smoke marijuana that day, and then there's other witnesses who say he may have but we didn't see him. And the only thing we know is he drank a 40-ounce thing of beer. That's it. That's all anyone ever saw him drink. And when he's later arrested and his car is searched, there's two cans of 40-ounce beers in the car, one of Mr. Carrillo, one of Eric. But let's look at what else is found. What else was found was an armed pepper spray canister, an Army Swiss knife, and a club, a flashlight-type club, and that's Eric preparing to go to a party. Does that give you any idea as to the level of paranoia and how continuous and prevalent it was [14] in his mind?

You can measure, I believe, Judge, fairly that when you're considering what is a persecutory delusion and how did it affect Eric, how did the mental disease affect Eric's ability to understand what was going on around him. We

know that he wanted to attend college. He wanted to play football. He had apparently all the abilities to do so and, yet, his mother – he told his mother that he quit playing football, he didn't want to play football, and later we learned why. He felt like his bones were cracking and he felt like the aliens were poisoning him because he decided to quit playing football. Does that give you an idea of how distorted Eric was? And that was in the fall of 1999.

We know that Eric's disease was continuously intensifying. Dr. Moran told us that yesterday and you'll read that in his report, it was continuously intensifying. We know that schizophrenics, first of all, paranoid type, are much more likely to be involved in violent incidents. They're much more likely to commit suicide. They're much more likely to commit a homicide. We also know, and Dr. Moran agrees, Dr. Morenz completely agrees, trying to predict a schizophrenic, whether they're going to commit an act of violence, it's unpredictable. You cannot look at an appearance eight [15] hours before and assume and look at and say, oh, this person was functioning just fine and they have – he would never commit this violent act. We know it's unpredictable. You can't do it that way. So the process by which Dr. Moran has concluded that is flawed by his own testimony. It's flawed.

And why do they kill, Judge? Why do they do that? Because the voices don't leave them alone. It's a relentless pressure. Can you imagine – excuse me – let me ask it this way: Imagine if you will that you take in a breath and knowing or believing you're getting poisoned; that the food you eat at home with the people you love is getting poisoned; the clothes, the very clothes you're wearing is getting poisoned. I mean, what do you do if it's never going away?

We know from Dave Clark, he said it was all about Eric's paranoia. It never quit. It never subsided.

Let's talk about the things that were occurring that we were observing. In school Eric was playing with a pen. We now know he believed it to be a laser that only aliens could see. He believed the reason he was put in jail – we were asking Dr. Moran late yesterday in the afternoon about whether being arrested for first degree homicide would be a stressor. Eric [16] thought he was being put in jail because the aliens hated him. He thought that Flagstaff was full of aliens. This is what he told Dr. Moran. He also believed his brother, his sister, his father and his mother were aliens. Aliens, Judge.

Our families are important. And, certainly, I think both sides of the aisles here agree, that's why they're here, because family is so important to us as a society and as what makes up our life. And, yet, here is this kid, 17 years old, trying to deal with everything else in school that 17-year-olds deal with, and he's trying to deal at the same time with the belief, a honest to God belief, that his mother is an alien and she's keeping it a secret from him. And we know that the – Eric's logic, the reason aliens are here, is to trade sugar and broccoli.

Again, is that reflective of cognitive ability? Think about all the witnesses that testified and told us about the bird in the car. Most of them thought it was pretty bizarre. He kept it in the trunk when he was in school. On senior ditch day, it's flying around the car. The police officer arrests him, there's a bird in the car. And, yet, he believes this bird, which is basically his best friend and only friend, has a robotic lung and its – the aliens are so sophisticated,

[17] they replaced this bird's lung so that Eric won't know that they are still poisoning his air.

Judge, I don't think that there's any doubt that's evidence of Eric's break with reality. There is no question here that his reality was grossly impaired.

You know, the problem in this case, Judge, was there was so much initial push to believe that Eric was simply a drug-crazed teenager. The police investigated this case, they repeatedly made statements to witnesses and through their investigation, in fact – I can't remember the officers that testified towards the end of the state's case – basically said, yes, I interviewed 50 people and most of them never saw Eric use any other drugs than alcohol and marijuana. And when I asked Dr. Moran, you know, look at the voluminous records, did these officers – did they even attempt to try to find out if Eric really was mentally ill like Terry and Dave had told Detective Gillette almost at the very moment that the police are coming into their door? No, they didn't. They didn't. They did little or no investigation into that.

And so the problem is, is that you kind of have this initial push of, God, he had to have been intoxicated or on drugs. But the reality is, three years [18] later, we know he was unadulterated, so full of schizophrenia, his mind was so taken and so gone that he was dressed in double layers of clothing, he was stringing strings in his car and in his room to protect himself against them. He was so frightened, he was telling his mother he was going to commit suicide.

Judge, I'd like to put in context for you what Dr. Moran's testimony was about his global assessment of functioning. We know now that other mental health

professionals have done the same thing with Eric. All right. 1999, summer, Aspen Hill admits Eric. They GAF him at 30. And Eric's committed for three days. And we know at that time, 30, Eric's rolling around on the ground in front of a police officer, his moods ranging from laughing to crying to napping, he's going to nap, he's going to go to sleep on the ground in front of the police officer. We know that he suddenly spins on his father, F-U, and his father sees that look in his eye change and his father knows something's not right. Eric is not there. Eric is gone. Wherever Eric is, he's not there at that moment. And Eric's committed, committed for three days, not Title 36, committed for three days.

Okay. A year later – excuse me – a year and several months later, August, 2000, Eric's been sitting in jail. We obviously know he hasn't been on any [19] drugs. From the moment he's placed in jail his – I mean, it's so funny, because if you look at the slope here, we can see from about senior ditch day on, Eric's sliding. Here's what happened, he's arrested, his symptoms continue, it's a smooth slope, it continues and continues and continues and continues until when? Medical intervention. Someone finally hits him with Haldol and it slows him up. The slide stops.

But let's talk about the Title 36 that occurred in August. We know that Dr. Shelley Everley GAF'd him at 20. We know at 20 Eric was sitting in his cell yelling, screaming about the aliens. The detention officers were aliens. This is all part of an experiment. Most white people are aliens. He was telling them – at about exactly the same time his parents Aaron's story. Flagstaff's full of aliens. Only bullets can stop aliens. He's GAF'd at 20. And what happens? Judge Newton renders a verdict, after

listening to all of the evidence by many of the health professionals, that he's a danger to himself and others. He's Title 36 and he's involuntarily committed for treatment. For treatment, Judge, and the treatment begins. That's September, 2000.

April, 2001, Eric is sent to the Arizona State Hospital, a facility well known by this Court because their whole job is to look at people and their [20] mental state. And what do they GAF Eric at coming in on admission? 31, the same as Dr. Moran. 31, Judge. You had just previously ruled that Eric was incompetent to stand trial. He didn't even understand at 31 that he had to assist in his defense, that he knew who the judges were or anything else. That's the context of the GAF score. And that was Eric's highest level of functioning given by Mr. Moran just before the shooting. He was incompetent.

Is that a gross impairment with reality? Was Eric's behaviors considerably influenced by delusions? He had no job, Judge. I mean, when we were looking at the criteria, no job, no friends, his mother was seeking commitment several days and the day before the shooting, he was acting grossly inappropriate, he was carrying weapons. Remember he went from pepper sprays and knives to guns, Judge, that's the level of escalation. And he had these guns with him all the time, by the way. I know the state wants to act like he had to go get them and everything. He had it at the park. You can't have it both ways. You know, he had it at the party. We know he had it in his room. He carried it in a backpack. When you look at the state's evidence, there's another gun in the backpack. Is that – does that – is that a measure of the fear that Eric was [21] suffering?

We know that his hygiene was poor. And probably the most prevalent statement made was by Adam Lozano the day – the evening before the shooting, after Terry had spent most of the day trying to get mental health help for Eric, Eric says, I've got mental problems, and he's almost incoherent when he says it.

And since then, Eric has denied any type of mental health issue. He basically is resistant to medication. Before that, he refused to see counselors. Even Dr. Moran says, I agree, Eric should have probably been Title 36. Dr. Morenz says, it's very unfortunate he wasn't hospitalized before this.

And I'm sure that there are many things that the Clarks wish they would have done differently. And I'm certain the State of Arizona wishes it would have done something differently when they were asked to intervene and try to help us get mental help. But it's interesting to note that the burden of proof in a Title 36 proceeding is the same as is on the defendant right now. And there has not been a single expert, not a single witness who has testified that Eric was lucid and should not have been committed immediately before the shooting.

Let's look at the testing that was done by [22] Dr. Moran. These are tests that give a valid profile of someone who is quite disturbed psychologically, quite gullible, overtly paranoid, has extremely bizarre thoughts and believes in special mystical powers. He's going to be viewed by inmates as crazy. And this is when he's on Haldol. Judge, this law, our law punishes malice. We treat sickness.

I don't know if it's going to be argued by the state, but I have to bring this up, Judge. Eric has never said that the

aliens made me do that, made me do this. That's right. That doesn't mean, as Dr. Morenz has told us, that he wasn't insane. I mean, let's look at what was occurring. Was the aliens his best friends? No. They were his enemy. Alien – he was doing everything he could to avoid the aliens, to protect himself against the aliens. Of course, he wasn't operating under a command hallucination. He was operating in a total pit of paranoia.

Let's talk about prefatory behavior. One of the things that many mental health counselors look at or many health professionals look at, was there any prefatory acts. Also, Dr. Moran, in the interview 30 days before the trial tells me, no, there were no prefatory acts and, yet – and then I ask him, you know, did you make that statement? Were you truthful to me? [23] Yes. But now I have changed my mind. Now, I might add, he changed his mind in trial. In trial he changed his mind. Is that a strategist or is that an objective opinion? Well, I think it's more of a strategy because he was obviously, as he testified and testified and testified, it became quite apparent that whatever the state needed, he was going to give. And that's really how you have to look at his opinion. That doesn't mean he didn't lay a great history. No, he laid out an excellent history; unfortunately, he missed a lot of big issues. Not his fault. He wasn't given the information.

How do you look at this? How do you look at what happened in this case? Eric is certainly – and, certainly, loud music is booming. It's so loud, Judge, people hear the music with their windows closed, and for blocks.

Dr. Morenz, Dr. Moran testified, many schizophrenics use volume to turn out the voices, to drown them out. We know that Eric was listening to TV at night mostly,

volume full blast. Judge, it's pretty, pretty apparent, Eric was doing just that, especially when you looked at this overall. And when you stand on a mountain and you overlook this town, you start realizing the connections between, for example, where the jail sits, where you sit, his house sits, where the courthouse [24] sits, and when you look, because that's why you're on the elevated bench, you look down on this problem that's been presented to you and you start seeing all of the connections that are being – that are occurring and look at the connections that are there, I mean, there has been no witness, no witness that has come in and said Eric ever had a clear thought from about the fall of 1999.

And the state will argue, yeah, but, Judge, he still knew what was wrong because, look, he ran from the scene. Well, wait a second. He ran from the scene, and I don't think there is any dispute the police officer was shooting at Eric, so whether Eric was completely delusional at that point or of completely clear mind, that's not unreasonable for anyone under those circumstances to run.

But why would Eric run? Isn't it also reflective of his continued belief the aliens were out to get him? And did he run in a panic like someone being shot at? No. It's kind of a slow trot, like, huh? I mean, he's not even there, Judge. He doesn't even have survival instincts. Someone's shooting a large caliber gun at you, the brain goes into hyper mode and you're ducking, you're diving for cover, you're doing all kinds of things to save yourself, and Eric is slowly trotting away.

[25] Was there motive? Well, Dr. Moran told me that he didn't give any motive any consideration until he got to Desiree Barreras's statement, and he said that's about it. He never talked to us about the Thorpe Park. He never talked to me about Thorpe Park. You got to remember, he knew that I was there to interview him and find out all his nuances and, yet, he's telling – flip-flopping all over the place in trial yesterday.

But let's talk about the Desiree Barreras statements. We know that – and when you read that, when you look at the transcript, not the police report – that's the problem Dr. Moran had, he kept relying on the police reports that are completely inaccurate – we know that Desiree Barreras and Anthony Nelson, I believe it was, or Anthony somebody, Hernandez perhaps, said Eric said blah-blah-blah-blah-blah, and then we start – they start talking to her about Eric, and, well, you know, he's bisexual, he's gay. And, by the way, all these statements about F the police, kill the police, she is completely obsessed with Clinton Ezell when she's talking about that. She's talking about Clinton being the guy that actually shot – when we heard this, we thought Clinton did it, because that freaking little fag, Eric, I pushed him and he doesn't have the guts to do it. But that was not considered by Dr. Moran.

[26] Judge, the Thorpe Park incident is only reflective of Eric's delusional state. It is not reflective of a plan. The people that testified to what they actually saw and heard Eric do have all testified, Eric wasn't there. Eric wasn't there when he was making those statements. He was gone. He was under the influence. They don't know. You know the problem with lay people is that we know that most of the lay people, perhaps at the urging of the police when they were being investigated – when this matter was

being investigated, oh, yeah, he was crazy, he was on drugs, he was on acid, he was on coke, he was on meth, he was on ecstasy, he was on steroids, he was on everything, I don't think we missed any drugs, maybe heroin. I didn't hear heroin. But I don't think we missed a single drug out there. But that's not what it was.

Dr. Moran, Dr. Morenz ruled out intoxication. We know Dr. Potts, the state's consultant, in consulting with Moran ruled out LSD intoxication. Moran ruled out the intoxication element. And was Eric intoxicated? There's almost little or no evidence that Eric was intoxicated. Yes, they have a urine test taken 30 hours later from the shooting, and – but we know that that has up to, I believe, 25 or 30-day shelf life or half life, as they call it, in the system. We know that [27] marijuana has a smell, a distinct smell. It's stinky and it stays around. And we know not a single police officer that was on the crime scene mentioned any words that the truck smelled like marijuana.

So what gave Eric the wild eyes that Susan Rinck, Mike Greenway, very reliable witnesses, as they saw this driver going around and around and around, what was it, Judge? You know what it was. There was nothing else there. Eric wasn't there. He wasn't there, not mentally. How do we know that? Look at what happens when he gets taken to the police station. He's arrested under the belief, because no one told him – he was arrested for DUI drugs at that time. I come in and tell him, you know, they think you killed the police officer. Bryon, I don't need you here. I don't need you here. And so I leave. We leave the room. And he starts mumbling, singing to himself, why do you have a problem with me? I mean, poison me? What the

fuck does that do? Take me away. I want to go away. Clearly disturbing behavior.

We also saw this in testimony where Eric, Jason Tackett told us. Would ramble to himself like a homeless man walking down the street.

In the jail the detention officers heard Eric talking to himself about everybody needed to be [28] saved from the aliens. Should it be argued only this poisoning thing – only Eric was responding to this poisoning thing? Wait a second. Wasn't he doing things to try and protect himself? Wasn't he getting pepper spray? Wasn't he stringing his car, his room, washing his clothes, all under the belief that he was being poisoned?

Judge, if we're going to have to use circumstantial evidence to figure out what was going on with Eric and what was Eric's likely reaction at the time of the shooting, we have to look at what happened just several days before at the party. We know that Eric goes to this party with this guy that he barely knows and Aaron Fitzhugh says he kind of thought it was odd that Eric was even there. Then, as they are smoking marijuana, Eric locks the owner of the house out of the house and is smoking marijuana inside. Then, Lauren Beach sees Eric sitting on a chair saying to people, why are you looking at me? Why are you talking to me? We know that simply because Eric – or excuse me – because Brandon Matje says Eric changed. Eric did change. In five seconds or less he was on Brandon, punching him, smashing his nose, breaking it. And to have a second later when Aaron Fitzhugh pulls him off, his eyes are gone, he's staring right through him, he appears [29] confused, he runs off and pulls apparently a gun out of his sock and then runs away. I'm sorry. Says, don't call the

cops, and runs away. That blank look has been testified to by many people; Victor Meza, Dave Clark, Terry Clark, Aaron Fitzhugh, someone who barely knew Eric, and, again, by Susan Rinck and Mike Greenway, Eric, the look in his eye, you can tell what a man thinks by the look in his eye.

No one disputes that Eric was psychotic on the day of the shooting. No one. No one disputes he was delusional. And yet, Judge, when you're making this determination as to what should occur here and you look at Eric, when you look at his eyes, it's a real simple question, was there ever a window of lucidity, ever, in the evidence you have to consider? Or was schizophrenia, delusions, psychosis, so severe that the curtain of insanity was closed?

Judge, the look in Eric's eyes tells us, there is only one verdict, and it's an unfortunate one, he was guilty but insane because there's no other way to analyze the evidence. Thank you.

THE COURT: Thank you, Mr. Middlebrook. Mr. Powell.

MR. POWELL: Just a minute. This is going to take me just a couple minutes to set up.

[30] THE COURT: Certainly.

MR. POWELL: Judge, I'm going to be placing something on the overhead but I'd like to give you a copy. It might be a little clearer.

THE COURT: Certainly. Thank you.

MR. POWELL: Judge, good morning.

THE COURT: Good morning.

MR. POWELL: What I normally do in closing arguments, Judge, is, of course, begin talking about the facts, but I'd like to start with the law today, for obvious reasons, because we're in a position today that's not rare but not all that common either. We're looking at an affirmative defense which we're going to implore the Court to remember with a burden of clear and convincing on the defendant. And so I want to talk to you a little bit about the law if we could to begin with.

Judge, A.R.S. 13-502 is a law in Arizona, in spite of what the defense challenges, however they want to phrase it, there is no other law in Arizona than right here, it's 13-502. And insanity is an affirmative defense, must be affirmatively proved by the defendant and the defendant alone. The defendant cannot rely on state's failure to disprove the defense. And, Judge, you are well aware that the legislature changed the law because it decided that it was too difficult to make the [31] state prove a negative, that a person was sane, as opposed to having the defendant prove that he was insane. So the burden is not on us in any manner whatsoever and that cannot be argued nor should it be a consideration. The burden is by clear and convincing evidence, and this standard of proof is specifically beyond the burden required for proof of other affirmative defenses.

Judge, if you look at 13-205, that is the affirmative defense statute. It provides, unless otherwise specified in the statute itself, that preponderance of the evidence is a standard in affirmative defense.

If you look at 13-502, the insanity statute, it specifically raises the burden of defense. And that was done by

the legislature consciously, Judge, so it is a higher burden and that's something we will talk about later.

The clear and convincing standard is reserved for cases where substantial interests at stake require an extra measure of confidence by the fact finders in the correctness of their judgment, though not to such a degree as required to convict of a crime.

Moving on still with the 13-502, insanity is a two-prong test, Judge. The defendant – first prong is that the defendant is afflicted with mental disease or [32] defect. Second prong, it has to be of such severity that the defendant did not know the criminal act was wrong. Mental disease or defect alone satisfies only the first prong and, as a matter of law, is insufficient to satisfy the insanity defense. Prong two requires an affirmative causal connection – this is going to be a key, Judge – affirmative causal connection between the criminal activity and the mental disease or defect.

Now, put another way as said by Dr. Moran, but for the mental disease or defect there would have been no criminal activity. And, again, this causal connection must be affirmatively proved by the defendant with its own evidence that it has to be clear and convincing.

Judge, this is the law in the State of Arizona. It cannot be challenged. Dr. Moran and Dr. Morenz agreed specifically that they agreed that that was the law. But this morning, Judge, the defense, again, has argued at infinitum one prong, prong one, and has said nothing about prong two, which is just as important. It's required, just like the prong one.

Judge, in all honesty, with all due respect, what I think is that the defense is just trying to wear you down, just like they would a jury; they're going to hear how bad the sickness was, they're going to [33] hear how bad the sickness was, and pretty soon you're going to think he must have been so sick this happened.

That's not the law in Arizona. That is but one part of the law. Then has to be the nexus, which there is none here, showing that it affected the defendant to the degree that he had no knowledge that it was wrong. And there has to be affirmative evidence, no supposition, no guessing, nothing like that. There has to be affirmative evidence. And we are going to talk about that in a bit.

They're trying to get you, Judge, to use emotion. And I should point out when counsel today in his opening close said something about punishing people who were sick, now that's not right. We're punishing people that killed – we're going to punish a person that killed a police officer and knew what he was doing, he knew it was wrong. If he's sick, so be it. He knew what he did was wrong.

The bone of contention, Judge, is not number one, not prong one. The defense has spent well over a week proving the issue which was not challenged by the state. We have not challenged prong one. The state all but stipulated that the defendant was afflicted with schizophrenia paranoid type. As a matter of fact, the state presented Dr. Moran, who actually made a more [34] complete and compelling case with the diagnosis of schizophrenia paranoid type than did Dr. Morenz because of his additional testing and efforts. This is somewhat interesting in that the defense now is picking and choosing with Dr. Moran's reports, and when something is good, they say, of course this is right,

when something is harmful to them, they're going to distance themselves and say he's aligned with the state, even though he comes in and makes a much more compelling case for the defense on prong one. Judge, we don't challenge prong one.

I'm going to leave that now. We do take issue with some of the information provided by the defendant's family, and that's something we are going to talk about in a bit. We'll come back to that area.

What has been proved over the past few weeks, Judge? That the defendant changed? He became reclusive. His hygiene suffered. He became more paranoid. And he may very well have suffered from delusions regarding aliens. And we've heard from friends and family in great detail, time after time, telling us the same types of things.

Now, what I'd like to do is, I jotted down some notes, I have an outline, but I jotted down some notes during counsel's opening close, and I think this is a better time to kind of confront some of this, Judge. [35] The defense argues that the defendant was feeling he was being poisoned; the air, his clothes were being poisoned, his parents were aliens, the pen, the laser, the bird, that he did not attack Officer Hoyt when he was arrested, Oak Creek, all of these things, Judge. But did you once hear any causal connection to the murder of Jeff Moritz or is it just pound on prong one again? That's all you've heard.

What we're going to ask you to start looking at is prong two very heavily today. We're asking you to speculate an awful lot, your Honor. Now, we've heard of these changes with the defendant, but we also heard of defendant's rapidly and increasing use of alcohol and marijuana, at a minimum. We heard daily use of marijuana

from witnesses. We heard a witness say he smoked marijuana with him over 200 times. We've heard numerous people say multiple times during the day, sometimes before school, sometimes before a game, I think one witness even said before a Pop Warner game when he was playing with him. And then we heard from Dr. Morenz, every night at the school by his home.

Judge, you could just as easily when you look at this photograph that defense has been showing you, you could just as easily see a joint in that mouth, you could see a bottle of something in that hand and you [36] could see a gun in the other hand, Judge, just as well. That's what the evidence has proven to you. We know the alcohol was generally on weekends and it was to excess. I will ask you to remember back to Hillary Engelke, who told the story of when they left the banquet the sophomore year and went to another girl's house, they told him not to drink and he continued leaving the house and coming back with a quart, I think it was, or something, a liter of some kind of soft drink he was filling up with alcohol. He became so drunk that he had to – basically passed out and had to stay the night.

Well, what's the issue with that, Judge? Because as we have heard, the doctors have said, no, that's not the cause of the murder. But we have many, many witnesses describing the appearance of the defendant being under the influence of drugs or alcohol. We have witnesses saying he smelled of alcohol and he smelled of marijuana. I'm not going to go through these in any great length. The senior ditch day, we've heard enough about that. Numerous witnesses, Judge. Is that schizophrenia or is that drug abuse? Lying down in a creek, stumbling on the way down, having an accident later on, being able to converse with a

police officer, criticizing the police officer for being 20 minutes late after you've wrecked your car, is that schizophrenia? Is [37] that an episodic section of that? Or is that someone that's drunk or stoned? And as not mentioned today, 42 tabs of LSD in his possession. We have Thorpe Park. And now he tries to minimize this, but he was told at the time each of the people that testified today said he was on something. They weren't sure what it was but he was on something, and one says he did have a beer with him. Teen night, Judge, smell, again, the appearance. The Fitzhugh party, first thing he says when he comes in, who wants to get high? Nancy Edmondson, bad acid trip. She wouldn't admit it but she was impeached by the officer that took the statements from her, he had a bad acid trip and he snapped and then he came back. Just the type of things that the defense now is saying is necessarily and absolutely a result of schizophrenia, when there are other alternatives even though he was suffering from the disease, Judge. And there are many more episodes, the Court will recall, and I'm not going to go any further.

But a special concern is June 20th of 2000. Adam Lozano, the defense has been saying that during the telephone conversation he could not be understood it was so bad. But also remember what Adam Lozano told you, he was under the influence of something beyond alcohol. That was his opinion at the time.

We also have Mr. Hakes, who saw him later [38] on at the theater, and he said, he was intoxicated and it looked like he was on something else.

Okay. Why is this important? Well, what did Dr. Moran tell us yesterday? And this was uncontested, no challenging to this. Dr. Moran yesterday explained very

specifically, and it was not challenged, again, paranoid schizophrenia does not mimic the appearance of marijuana or alcohol intoxication.

So when people say, Judge, that he was drunk or he was stoned, the chances are, he was drunk or he was stoned. Dr. Moran told us specifically, Dr. Morenz didn't contest it, Dr. Moran wasn't challenged with it, it does not mimic – schizophrenia does not mimic the appearance – I couldn't think of the word appearance yesterday – does not mimic the appearance of intoxication by either of these. What's the significance of this? The doctors, again, have said, this is not the cause but voluntary ingestion of alcohol or drugs – this is confronted in both sections 13-502 and 13-503, 502 being insanity, and in there specifically, Judge, it says, if the mental disease or defect is the result of the involuntary ingestion of alcohol or drugs, it's not a defense. That's something that needs to be considered. In 503, of course, goes on and says, voluntary intoxication is not a defense to any crime. So those [39] have to be considered also.

Also, it's significance, there was testimony from both experts that alcohol and drugs can exacerbate a mentally ill person's condition. And consumption of alcohol and drugs can also trigger a latent or dormant illness. These would be as a result of the voluntary ingestion of these substances, Judge. I'm just going to ask you to please keep the drug and alcohol use in your mind as we travel to some other areas this morning.

In comparing Dr. Moran and Dr. Morenz, let's start out with commonalities we have. At least they agree on the legal definition, to a certain extent. They both agree

that schizophrenia alone does not satisfy the insanity defense. And they agree the defendant is schizophrenic.

Now, the defense was somewhat critical of Dr. Moran during the opening statement. They said eight hours beforehand should not be used. That's not anything that's reliable. Yet, when you go through the notes you'll see – or the reports you'll see that Dr. Morenz commented on that fact also, Judge, very minimally, but he did. Dr. Moran was criticized because he supposedly testifies only for the state. He told you that he is on a Maricopa County appointment list. It's a very [40] competitive list to be on, Judge, as you well know, and that means he's appointed for both sides by the courts, so he works on both sides. He told you that there was no strategizing. He told you the times we got together was so he could educate me on the area of law we're in – or the area of medicine we are in. The doctor also told you that the state in this case, or whatever party he's working in with the other case, has no input in what his decision is, what his evaluation is. He said he will work with them in trial prep, but that's it. He makes the professional calls. And, Judge, you'll recall, you know, just because someone says, I'm hired by the state, I'm hired by the defense, that doesn't always mean that's who they testified for. And Dr. Moran told you a story up here on a case I was prosecuting years ago when I brought him up, the defense witness expert said the person was insane. Dr. Moran came back and told me – I'm sorry – yes. Dr. Moran came back and said, yes, he was insane when the defense expert said he was sane. So just because – that was a retained case, Judge, and just because he's retained doesn't mean he's going to say whatever needs to be said. He's a professional.

Let's look at Dr. Morenz's efforts. He met with the defendant four times, first for the competence. There was really – he said it was somewhat [41] helpful just because he got to meet him, got to know him, and but there was really no conversation of any sort. He met him a second time for about an hour-and-a-half under the same circumstances. This was not a competency hearing. This was a meeting. This was for sanity. But, again, this time for about an hour-and-a-half, no give and take, just again got to see him and look at him. Finally, there's a meeting of an hour-and-a-half, complete hour-and-a-half when insanity issue was discussed. This is when Sarah's story comes up. This is where the alien stories come up and all of this. And then he met the defendant Friday, Friday, last Friday morning just before court. So, basically – and that was, of course, after his report had been written and he'd been interviewed. So we have the two meetings with – where there was no conversation between the two individuals and we have the one and one-and-a-half hour meeting, which can kind of be pointed out because he met with Mrs. Clark for even longer, for two lowers, longer than the defendant, and he said he put much weight on her recital of the history of the defendant.

He most recently met Mrs. Clark on June 19th of '03, this year. Dr. Morenz testified she obviously wanted to help her son in any way she could – that's a direct quote, Judge – but, yet, again, the [42] Aaron story was conspicuous only by its absence. The Aaron story that allegedly was the product of the defendant's mind in August of 2000, the Aaron story that just, at least to the state, I believe a week ago, probably two weeks ago yesterday, two weeks ago Monday, I'm sorry, was brought to our attention. It was not brought to the attention of Dr. Morenz until the night

before he testified. It was not brought to the attention of Dr. Moran, the two designated and chosen experts, until I told him after I received a fax when I was in Phoenix because I had to be in Phoenix that week. That's how I learned and that's when I learned, Judge. That's how Dr. Moran was told.

Now, when the Clarks testified, when Mr. and Mrs. Clark testified, you could tell they were doing everything to help, Judge, and there's nothing wrong with that. They're parents. They were trying – they were pushing every time. You'd ask a question that called for yes or no and, boy, three minutes later, I'd just wait and wait for the answer because everything would be volunteered. Yet, Aaron's story, the story that kind of put this all together, makes this all a mystical thing, that's now understandable, was never disclosed. And Judge, we maintain to you, it was not a product of the defendant's mind. It was a product of someone else's [43] mind. Right before trial – or, actually, during trial is when it's first disclosed. We would ask you to seriously consider whether or not there's any truth to that story; and, as a result of that, we ask you to seriously consider some statements made by the parents because, in all honesty, we think that's who concocted this story, Judge.

Let's look at the Title 36 also. Do you think it makes any sense, your Honor, that for one year the family tried to get mental help for the defendant and was unable to? Now, maybe if they were some family with no resources whatsoever, no education whatsoever, maybe someone that doesn't really give a rat's whatever about their kids, but that's not the case. And they had the benefit of a fine, fine lawyer. They were consulting with Mr. Middlebrook and,

obviously, Mr. Middlebrook knows mental health pretty well.

Judge, they claim they never learned until August, two months after the arrest, that they could get mental health for him under the guise of Title 36. Now, I want to ask you, Judge, if you remember when I asked the questions of Mrs. Clark about that and she said, no, we didn't find out until about August. And Mr. Middlebrook stood up and there was an obvious question he could have asked. Basically, he would have been [44] testifying. He could have said, isn't it true that I never gave you any advice about a Title 36? That question was never asked, and there was reason it was never asked, Judge. It's not true. Just like Aaron's story is not true. It doesn't make sense. And, besides, and the – we're not attacking the family. That's not why I'm here. What I'm trying to do is kind of portray this so you'll have some questions about, when you hear statements from the family members, if they're as bad as they say they were, because if they were, wouldn't any parent with the intelligence of them, the resources of them, wouldn't they have done something if it was as bad as they say it was? Please closely scrutinize the testimony, Judge.

We're back on Dr. Moran. We know that – I'm sorry. Dr. Morenz. Dr. Morenz performed no mental health tests on defendant. And, again, these were tests that Dr. Moran said were extremely helpful in diagnosing the schizophrenia of the defendant that Dr. Morenz didn't find it necessary to take the time to go back.

Dr. Moran, if I remember correctly, saw the defendant on two occasions, the first were three-and-a-quarter hours, and that's for his interview, and the second he went back

for another three-and-a-quarter hours to do the mental health tests. [45] He went the extra yard, Judge, so he could come up with a valid finding, not just one. I spoke with him for an hour-and-a-half. And, by God, I can reach a conclusion based on this. He went out and actually did the tests, tests that can be empirically challenged. If they would have come back saying that he was fine, the defense could have had those and looked at them. Again, not done by Dr. Morenz.

Judge, also, I know you are quite familiar with the DSM, the diagnoses, there's five axes on the diagnoses, all five are important. Dr. Morenz reported findings on three. Of course, Axis I, that would be the psychological one, mental health; Axis II and Axis III he just had basically, I think, no finding. I can't recall. No diagnosis on each of those. And the second of that is, of course, behavioral, personality disorders. And even Dr. Moran said it's difficult, it's difficult to do it. Dr. Moran said, I think it's there, it was there beforehand, but it really has no impact at this time. Dr. Morenz just said, well, I can't tell you. On Axis III, physical problems, there probably are none so no diagnosis. That's fine. We know of none. But, Judge, Dr. Morenz completely failed and ignored Axis IV and V, which are crucial in a case such as this when someone has to determine insanity. The issue – that's the way the [46] state believes this issue is, Judge, is he's – he has mental problems but the defense can't show what caused – they can't do that causal connection. And what is the way they would have done that, Judge? One of the ways they would have done it is by showing what the stressors could have been. Axis IV determines stressors, Judge. Dr. Moran said for him to escalate from where he was when his parents left him at that theater to escalate up to a level he had

never, never approached before, required some stressor; alcohol, drugs or some other type of stressor. Dr. Morenz didn't even do the evaluation regarding stressors.

Judge, the friends and associates and parents, family members can assist your deliberation with prong one. They can't help you with prong two. They can't. Here, Axis IV, was a chance for the defense to give you some guidance and show you the causal connection nexus that was there and they failed to do so. And it was – if you remember, I asked Dr. Morenz, was this an intentional omission? And he said pretty much, yes, I thought it was kind of sprinkled throughout the report, is the way I believe he responded to it. Axis V, the GAF score, which he talked about quite a bit, again, a chance to quantify – a chance to quantify the functioning level of the defendant immediately before the murder, no effort [47] made by Dr. Morenz as Dr. Moran did. Now, even though he was somewhat critical – Dr. Morenz was somewhat critical of it, at no time did he volunteer, knowing that there was a GAF score out there, Dr. Morenz during testimony, he at no time volunteered another score. He said it could have been lower. If I recall correctly, that was the gist of talking about the GAF. He said in his testimony, it is a rough scale and it may provide false sense of precision. That was his criticism of it. But its generally accepted in the community, in the scientific community, and it is one of the five standard axes for a DSM diagnostic – diagnosis. I'm sorry.

If the doctor thinks or is so critical of it, he had an opportunity to explain how Dr. Moran came up with a 31, Aspen Hill came up with a 31, state hospital came up with a 31. Granted, Dr. Everley came up with a 20, Judge, and we understand that. But the fact that three of them are within one point or identical, it seems that that's not too

rough, Judge, and that can give guidance. And Dr. Moran relied upon the GAF in determining that the defendant was sane at the time. Also, Dr. Morenz, although he interviewed the mother, he interviewed no other family members, as did Mr. Moran.

The defense claims that Dr. Moran's consulting with other mental health professionals for [48] guidance. They say it's somehow trying to align themselves with us. You didn't hear anyone say that anyone from the state was present for those. That was the doctor talking to a doctor. And that should be applauded, your Honor, not criticized. And, basically, Judge, Dr. Morenz took every shortcut available in both the preparation and the completion of his report. And it's sad but it's true, Judge, it's there. It's in the report, seven-page report, which you can contrast with the 67-page report of Dr. Morenz, which has a complete and full history, which is actually applauded by the defense. But of all these shortcuts, none of them are quite as dramatic as his conclusion on page seven, again, on the seven-page report. In here, one paragraph, it begins: Psychotic as a result of the schizophrenia.

No challenge there, Judge.

When he talks about the Sarah story, he says it could be a result of confabulation, where he doesn't remember what happened and just unconsciously people fill in details.

Dr. Moran told us that there's no known tie in between schizophrenia and memory loss. That was during his testimony yesterday. Judge, if there is truly memory loss, we maintain to you it could just as easily be from the use of marijuana or alcohol. And on [49] cross-examination

the doctor did admit the defendant could just outright be lying with this Sarah story.

Judge, I'm kind of at a crossroads here, whether I want to go through all the things that we have talked about that were not considered in the doctor's report, starting with Thorpe Park, going through every step of the way, seeing the person, being with the mother that day, the mother taking him places when he decided he wanted to go, the mother leaving him there, not feeling she had to stay with him, Sizzler, for an example, then she took him to get a drink, came back, stayed at home with him for a bit, father came, he is taken to the athletic club so he can bathe, father doesn't stay with him, he goes and picks him up when the defendant is ready and calls, they go to the movie, they watch the movie together, nothing unusual, the parents state he's in good spirits, he's happy, everything is fine, and at this point they say, as fine as the defendant can be, so be it what they told the police and admitted it on cross-examination, they said he was fine, he was in good spirits, and that's why they left him at 9:30 that evening at the theater.

Now, what happened after that, we don't know until sometime after 1:30. We don't know if he stayed and watched the other movie, Gone In 60 Seconds. [50] But we do know that at some point in time he somehow was able to get to his home, didn't have a car, doesn't have his bike, he only rode his bike once and that was to take the gun away, somehow got to the house, somehow got in, got into Gentry's room, got the keys, somewhere got a gun, went out, opened the truck, got in the truck, put the keys in, started the truck, and drove away, using the clutch, using the shift, because we know it's not automatic. We know all of the facts of him driving around from sometime probably

before 4:00 a.m., some people say 3:00 but I think that's too early, until at least 4:50 when Officer Moritz is killed. We know he's blasting the music. He does the route in that one area of University Heights 22 times. And it makes me think back to Thorpe Park, Judge, just what he said he was going to do, he was going to taunt the police officer and he was going to kill him with his .22. Officer Moritz comes up, puts the overhead lights on, takes 50 seconds for him to stop, stops just a half block away from his home. Officer Moritz we know had to use the siren for a period of time. We know he exited the vehicle because the last words he said to dispatch other than 999 were, I'm out with him, and he called in the license number. We know he's ambushed. We know he's killed. And we do agree that he fired two shots. We know the defendant [51] ran, was able to conceal himself for 16-and-a-half hours, I think we figured it out, and that he was able to get rid of the gun before he was arrested. You have to remember, he still had gunshot residue on his hands, which makes one think he kept the gun up until towards the end. We know he ran from the police, but we know he went to his home. We know he ran from the police and he did not stop until he was confronted basically by a laser on his chest from Detective Higgins. He resists to a certain extent, not much, and he's arrested.

Judge, you'll remember that's pretty much the same chronology I went through with Dr. Morenz. I said, did you mention any of that in your report? And he said, no. I don't put things in about the police reports.

Judge, on an insanity case, you know, you have to look at that. That's how you make the nexus. You consider things like that. And he said, oh, I considered those. But you'll remember at great length we went through about

how do you write a report, you know the importance of reports, you know how detailed they have to be, you know that the Judge is going to rely upon that, the parties, they could actually mean something bad for the defendant, yes, all of that, but not one mention of it. And I believe, Judge, I did ask him a question [52] during his testimony and I again said, you gave the Judge no guidance on any of these areas in your report, and he said, that's correct. I was specifically talking about Thorpe Park and the fact he ran during the transcript.

Again, just like before with the GAF, Judge, this was the defendant's chance to show the causal connection that is required under Arizona law. And it wasn't there, either in his testimony or in his report.

Judge, let's go through a little bit more on his conclusion, I would implore you to read a few times, but the last couple sentences: It is not known what Mr. Clark was thinking or perceiving at the time of the alleged offense. And I think everyone's in agreement with that, Dr. Morenz and Moran agreed, but given he was very psychotic before and after the alleged offense, it is reasonable to infer that his perceptions of what was transpiring at the time of the alleged offense was probably bizarre and a distortion of reality; thus, there is considerable evidence that indicates Mr. Clark probably did not know his acts were wrong at the time of the alleged offense.

And, Judge, you'll remember, we went over the DSM, the forensic portion, things that they – doctors can do and cannot do in a forensic setting, and one is they cannot infer that a person met a legal [53] definition because he met a clinical definition. And I'd like to read this into the record again, Judge –

MR. MIDDLEBROOK: The evidence is closed, Judge, so he can't read it.

MR. POWELL: What was that?

THE COURT: He said the evidence is closed, but you can read it.

MR. POWELL: This has already been read in, Judge.

THE COURT: You're just reaffirming what's in the record.

MR. POWELL: And, again, this is on Roman numeral XXXII, Use of DSM-IV in Forensic Settings: When the DSM-IV categories, criteria, and textual descriptions are employed for forensic purposes, there are significant risks that diagnostic information will be misused or misunderstood.

And that – this is what I read in before: In most situations, the clinical diagnosis of a DSM-IV mental disorder is not sufficient to establish the existence for legal purposes of a mental disorder, mental disability, mental disease, or mental defect.

And, Judge, you'll recall that I asked Dr. Morenz specifically, mental disease and mental defect, are the phrase on our 502 and he agreed.

[54] So then if we go on down, about middle of the page on Roman numeral XXXIII, moreover. Moreover, the fact that an individual's presentation meets the criteria for a DSM-IV diagnosis does not carry any necessary implication regarding the individual's degree of control over the behaviors that may be associated with the disorder. Even

when diminished control over one's behavior is a feature of the disorder, having the diagnosis in itself does not demonstrate that a particular individual is (or was) unable to control his or her behavior at a particular time.

Now, Judge, I asked Dr. Morenz, I said, aren't you asking the Judge to do something you're not allowed to ask? And he said, no, I'm the one that's inferring and I'm just giving that to the Judge as my opinion.

I would ask, Judge, you, if you get a chance during deliberations, please review this and compare it to the last few sentences in his conclusion and see what the doctor is asking you to do, see if he is living within the bounds of his own profession, his own professional standards.

Judge, what I'd like to do is, I'm not going to be much longer, but did you want to break now?

THE COURT: Keep going. Are you just [55] about done? Well take a break when you get completed.

MR. POWELL: When I get?

THE COURT: When you get done.

MR. POWELL: Okay. I'd like to go into a different area here, Judge. And what I'd like to do is give the Court a very brief legal history of the phrase clear and convincing. And it kind of came to a head in State versus Renforth, R-e-n-f-o-r-t-h. And, Judge, we do have a memorandum of law that we are going to present for your deliberations in that area.

THE COURT: I have already read it, counsel. I read it yesterday when it was presented to me.

MR. POWELL: Okay. I'm going to go into some other things. Basically, what happened here was a case was reversed because of an improper clear and convincing instruction was given in an insanity defense. This was with the Court of Appeals, Arizona Court of Appeals in '87. Review was granted by the supreme court. It was then rejected by the supreme court. And it was rejected because State versus King had been decided by the Arizona Supreme Court, which took care of the issue of the definition of clear and convincing.

And, Judge, what I would like to do is read again one portion of the conclusion, then I'd like [56] to put this up and let you look at this. It is not known what Mr. Clark was thinking or perceiving at the time of the alleged offense, but given he was very psychotic before and after the alleged offense, it is reasonable to infer that his perception of what was transpiring at the time of the alleged offense was probably bizarre and a distortion of reality; thus, there are considerable evidence that indicates Mr. Clark, he probably did not know his acts were wrong at the time of the alleged offense.

And, Judge, this is State versus King, Arizona Supreme Court case, September 22 of 1988. This is the law in Arizona at this time. The correct instruction would have apprised the jury that the clear and convincing standard is an intermediate standard between truth beyond a reasonable doubt and truth by a preponderance of the evidence. And the clear and convincing evidence is evidence that makes an existence of the issue propounded highly probable. Not probable, Judge, this is not a dicta opinion. This is what the Arizona Supreme Court has said the evidence has to reach to be an affirmative defense on an insanity case, because King was a first degree murder insanity

case, Judge. It was written by Justice Feldman and was concurred by all other justices.

[57] Judge, we know that we are bound by definitions of – strictly bound by definitions handed to us by appellate courts. Here, the supreme court has not said probably. The supreme court has not said a little bit more than probably. They have said highly probable. And, again, go back and contrast it to what was in the report of the doctor, Dr. Morenz. And, Judge, just to – just to make sure that nothing changed during testimony, I have gone through his transcript and on page 95, on the bottom of the page: "So I'm not asking the Court to make this inference. I'm suggesting that is what I believe probably happened, but it's up to you, Judge Coker, to decide whether he believes that's the case or not."

THE COURT: For the record, you're citing from his trial transcript?

MR. POWELL: Yes, sir, of August 22nd, page 95 and 96.

THE COURT: Thank you. I just wanted to make sure that's trial testimony.

MR. POWELL: Judge, that was his last comments on his opinion. He was not asked any more questions.

We know defense counsel knew the definition of clear and convincing because it was the first thing that was put up on the – by the projector [58] during opening statements at the mental health phase of this trial. It was the first definition put up there. No questions were asked of Dr. Morenz to see if he would reach the standards that he failed to reach. He said, probably based upon an inference.

Actually, that's all he would have before you, Judge. That's the closest thing you have to a nexus, and it's legally insufficient.

And I'm sure the defense will get up and say, well, Judge Coker, you can certainly look at all the evidence and say, I think it's highly probable, but, Judge, is that fair? The witness was here. He said probable. Everyone in the courtroom knew what the definition was and he didn't go to that definition. He didn't reach it. And there is a distinction between probable and highly probable, Judge. And you'll notice on – in the King case, the issue's highly probable, it's in quotes. It's not an oversight. We all know that Justice Feldman was a acting individual. This is the law in the State of Arizona. The defense hasn't done that, Judge. They beat the first prong to death, and we just sat back and watched because we completely agreed with them. But they can't make prong two, Judge, and that's why, basically, they refuse to even confront that prong. Thank you.

THE COURT: Thank you, Mr. Powell.

[59] We'll take about a five-minute recess at this time before we conclude with Mr. Middlebrook's closing remarks. Thank you, everyone.

(Whereupon, a recess was had.)

THE COURT: Let the record reflect the presence of the parties.

Mr. Middlebrook, you may proceed with your final closing.

MR. MIDDLEBROOK: If I can just wait half a second, Judge.

THE COURT: Certainly.

MR. MIDDLEBROOK: I will apologize up front in the front of this, and the reason I'm going to apologize is because I'm going to carry on probably longer than I really need to in this final closing because I'm going to show you right now, Judge, how desperate the state is to try to show that Eric was not psychotic at such a level that he was grossly impaired with reality.

There is a lot of testimony – or excuse me – a lot of argument about Dr. Morenz's opinion and his testimony that somehow – and I assume the state reviewed his testimony extremely carefully so they could use any nub in it to try to discredit Dr. Morenz.

Now, this is an expert they use on a [60] regular, regular basis. Now, I asked your court reporter for a copy of his transcript, as well, and I was given a rough copy so I'm not sure exactly the page this testimony falls on, but it's absolutely disgusting the state would argue what it does when you see this.

Dr. Morenz testified: "Based on your review of the records, your observations, your training, your experience, is it highly probable that Eric, as a result of a mental disease, was insane at the time of the shooting?"

And his answer was: "Yes."

Now, on my rough copy that's page 28, but I'm not sure what the official transcript shows.

Yes, Judge, highly probable, based on everything he did. And, yet, they have really the audacity to argue that he never said that. I mean, it's disgusting. But is it unusual in this case? No, because we know that the police

reports have remained inaccurate, especially when you compare a transcript to a report. The state mentioned Nancy Edmondson when she said she testified, I never told that officer he was on acid. Never.

The officer, they bring him in and he said, well, my report shows – well, you know, the problem is, we know what the problems are with police [61] reports and what people have actually stated. Put it in that category, Judge. And I guess that when we're looking at having you compare reports, I should have attached a five pound weight to Dr. Morenz's report because what we're talking about is, I guess if you weigh the reports literally, 67 pages versus seven, they win. But, you know, what do they win on? Evidence clearly constantly demonstrated was half provided to Dr. Moran or he flat out didn't know it at all, or the evidence that he was relying on critical issues was flawed. Flawed.

When we talk about – when the state talks about – and this is their thing, but for the mental disease there would be no criminal activity. Let me show you that again to demonstrate with pictures and what that means. But for the mental disease, this person right here would not have been in criminal activity. But for the mental disease, this is what he looked like.

Judge, there's no question that it's highly probable Eric was psychotic at the time of the shooting. And, of course, I showed you – or asked that specifically – question specifically of Dr. Morenz. I said, was he insane? And he said, it's highly probable he was. But it does tell you – and I'm not going to cite you supreme court cases because this case is about the facts, not about what the supreme court has done and [62] not about what a memorandum I just

got, that when I started my case, I told you clear and convincing evidence was highly probable. I don't know why we're talking about supreme court cases at the trial court level, unless there's nothing else to talk about, you know.

So what do you talk about? What do you try to show? That Terry and Dave created, fabricated, lied to you about the Aaron story? Okay. Well, let's talk about the credibility as to why they would do anything they could, including perjure themselves, including perjure themselves to help Eric. All right.

Well, let's see, on the day of the shooting, Dave and Terry said Eric was completely out of his mind. He didn't know what he was doing. He wasn't normal. When we took him to the show, he was completely 100 percent totally psychotic. He was running naked through the hallways with a rosebud between his teeth. Is that what they said? No. In fact, look at what they said to the police. He kind of looked normal to us, odd for Eric but, you know, normal for Eric.

But what did the two people that saw Eric say? They said – Carden Hakes said he looked like he was under the influence of something. Now, did the parents tell you that? No. They didn't try and make Eric look worse than he was.

[63] When Adam Lozano spoke to Eric, this is at 5:00 o'clock, this is about the same time Terry and Dave would have been taking Eric to the Flagstaff Athletic Club. Right? Did they say he was so incoherent you could barely understand him? No. Adam Lozano told you that. These are parents that would come in and perjure themselves to you, Judge? If they were going to do it, why stop there? Why stop at the Aaron story?

The Aaron story, coincidentally, the state forgets to mention, is consistent where Eric tells the detention officers, within a week he tells his parents this Aaron story, he's accusing the detention officers of being aliens. It's all part of the experiment. Most white people are aliens. I'm being held on an alien base. All the same time. You judge their credibility based on that. You judge their credibility based on what other people have told you.

And the Title 36, yes, competent counsel would advise them. First of all, those conversations were completely privileged, but I thought, let's go ahead and see where you're heading with this because, certainly, we spent most of the time with Terry Clark not talking about Eric's state of mind, talking about her state of mind.

Now, why are we wasting time with that? [64] Because there's nothing else to talk about. Because they know – I mean, they know. Were they going to bring in an expert to say that Eric was just perfectly fine that day? Hell no. They knew that there was way too much evidence for that. Considerable evidence is the words used by Dr. Morenz.

You can see the pattern here, Judge. I get Dr. Moran's notes that I asked for a month ago the day before he testifies. I get his report the day before he testifies – before the day before he's interviewed. In trial, critical transcripts are provided to me in the middle of trial. Come on. This has always been about the state trying to – trying to – I don't want to use the word fabricate because that's too strong a word – to hold back what's really there. That's probably the best way to put it in context. They've held back and held back and held back, because they know what I know and what you know what the evidence has

showed. Eric was insane, by legal definition, by mental health definition, by factual definition, Judge.

How many times have you heard prosecutors in criminal – in criminal trials in front of a jury say, circumstantial evidence is the same as direct evidence. Arizona gives it the same weight. And you can, too. The law gives it the same weight. If you go to bed at [65] night – you've heard this argument – you go to bed at night and you wake up and there's snow on the ground, you can say, it snowed last night. That is circumstantial evidence. Now, was there a videotape of it snowing? No, but we can look at the proof, we can look at the results, we can look at the footprints that are left afterwards.

Judge, here, look at the footprints. We've got – we've got the popular student, top of his class, very popular, very well liked, warm, loving son, warm, loving friend, funny guy. And in a year, in a year, not because of drug use, not because of drug use – the professionals write that out – Dr. Potts, the consultant, gets rid of that, Judge – in a year he goes from being a very popular, most likely to succeed kind of guy, going to college, going to play football, to sitting – I don't know if you can imagine this. You're at a high school and that you're sitting alone. Alone. No one's there. Your friends are gone. Your parents are aliens. And you're so frightened that you're carrying guns to protect yourself – excuse me, your Honor.

You know, the state has an obligation once the burden of proof has been met by a defendant to come in and review the evidence. They haven't. They haven't. There is no ice cold evidence, ice cold evidence, none. None. They rely on drug use, marijuana use, alcohol use [66] as cause of psychosis; yet, their people have ruled it all out. And,

yet, they still hand it up to you because they're pounding on a dead horse. They have nothing else to argue, nothing else to ride. They can't even tell you what happened at the time of the shooting.

We know there's a dent in the truck. We know that there is Vaseline over the driver's door window of this truck. We know bullets have been sprayed everywhere. They can't even tell you whether this happened in a struggle or not. They can't tell you whether this person fired the gun. They can't tell you whether Eric was running away, whether he was standing still. They don't have any of that. And, yet, they want you to believe that he was not psychotic, in light of overwhelming evidence that minutes before his eyes were gone, he was gone. And that's been based on the evidence, repeated evidence, not from Terry and Dave, some of it from them, but friends. Aaron Fitzhugh, who days before tells us he had a blank look, he wasn't there. This isn't a best friend. This is a kid who barely knows him.

We're talking about whether their expert has ever opined whether it was highly probable Eric was not insane. Here's their expert's opinion: Within a reasonable degree of psychological certainty the opinion [67] is offered that –

THE COURT: Counsel.

MR. MIDDLEBROOK: I'm sorry. Excuse me, Jonna.

– the opinion is offered that at the time Officer Moritz was murdered, the defendant was not suffering from a mental disease or defect of such severity he did not know that the criminal act was wrong.

No opinion, by the way, as to whether it was highly probable he was not, was there?

And let's talk about highly probable standard, that Dr. Moran has told us Eric should have been committed pursuant to Title 36. That's a clear and convincing standard burden of proof that has to be met to make that commitment.

Want to talk about opinions and what they're based on? That's Moran. He is basically conceding it was highly probable Eric was a danger to himself or others. Why is that relevant? Because when we talk about the GAF score and you look down it and you get lower and lower and lower into the GAF score, what's it talk about? Whether it's likely someone would be dangerous to someone else. Judge, 31 was the high of the day. It was a lot lower. 31 is your incompetent to stand trial. It was a lot lower, even by Moran; Morenz [68] confirms it.

Stressors. First of all, I'd like to point out that Dr. Morenz has been used by the state repeatedly. I'm certain if they thought for half a second his report, which they had disclosed to them for a long period of time, was somehow deficient, they could have gone back to all the other reports Dr. Morenz has authored for the state and compared it and said, look, Doc, you know, all these other cases you always came to Axis IV and Axis V. None of that evidence was presented because they know that Dr. Morenz's report is just fine. You don't need a 67-page, 20-pound regurgitation of the police reports to reach an opinion regarding whether Eric was insane or not.

And if you dispute that, remove the history part of Dr. – of Dr. Moran and look at what's left, just a few pages.

Everything else at the back of his opinion is basically photocopied pages of DSM-IV.

You have to remember what the test shows. Yes, he reached this clinical decision, blah-blah-blah-blah. I have already told you what the test showed.

Mr. Powell says, Judge, by the way, why bring up Dr. Potts or up the state wasn't even there when they were being consulted and creating a strategy? Well, [69] Dr. Potts was and Dr. Potts is their consulting expert. So we know that there was definitely a strategy in what Dr. Moran was doing.

Also, the Sarah story. Judge, they bring up the Sarah story. Remember what Dr. Moran said about the Sarah story? It confirms the diagnosis of schizophrenia. It confirms it because it reflects on Eric's lack of insight.

When you go through the evidence, you're going to see that Eric had apparently another gun in a backpack. This thing about going and getting guns and all that, there was no plan there, Judge. They've even attempted to say he must have held onto the gun because the gunshot residue evidence was that it was on his left hand.

Well, Judge, wait a second. And so he therefore kept the gun? It's like, what? What are you talking about? That expert never said that. The gunshot residue is a result of the shells going off, not how long you hold the gun. But, again, it reflects on where the state's level of certainty is and their ability to refute the evidence that's been presented to you.

Judge, I know I ended my opening closing kind of the same way and that is this: Is if there was ever a moment where Eric was rational in the months [70] before the

shooting, I'm certain that the hundreds of officers that investigated this case, they would have brought it to your attention. They never did because there's none to show.

Here's a kid who is a loner. He's up all night. He's wild-eyed. He's carrying guns because he believes the aliens are that much out to get him. He believes the aliens are constantly trying to poison him. And as he told Dr. Moran, they were trying to kill me a lot.

Judge, this kid was absolutely terrified. It's just that simple. His wild eyes that were seen moments before, his reality was gone. There was a gross impairment to his reality. There is no question of that. Thank you.

THE COURT: Thank you, Mr. Middlebrook.

I will take this matter under advisement at this time.

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IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF COCONINO

H. Jeffrey Coker, Judge
Division 3 — Deborah Young, Clerk
Date: September 3, 2003 — Lucy Luedke, Deputy Clerk

MINUTE ENTRY

THE STATE OF ARIZONA, Plaintiff, vs. ERIC CLARK, Defendant.	)	Case No. CR 2000-0538 (Filed Sep. 3, 2003)

ACTION: SPECIAL VERDICT

Before announcing the Verdict, I would like to thank the Moritz and Clark families and their supporters. This case is the saddest most tragic case I have sat on in almost 20 years on the Bench. Words cannot describe the loss to both families, the family of law enforcement and this community, and yet you have conducted yourselves before this Court with dignity and grace. I am confident that you all will continue to do so and that this Verdict can begin to bring some closure.

I would also like to thank the attorneys. The case was well prepared and professionally tried. Both sides advocated with conviction and yet sensitivity to the deep feelings that this case has aroused. Thank you for the respect that you showed to the court, to the witnesses and to each other. The State and the Defendant were exceedingly well represented here. Thank you.

This Verdict is not for one side and against another. There are no winners in this case. It is a recitation of the law, a finding of the facts, and an application of the law to those facts.

The court has divided its Verdict into two parts:

First Verdict

The Court has reviewed the entire record and the law. The Court first finds beyond a reasonable doubt that the Defendant Eric Clark shot and caused the death of Police Officer Jeff Moritz.

Second Verdict

The Court notes that the Defendant has entered a Plea of Guilty but Insane. Pursuant to §13-502 (c) the Defendant bears the burden of proving the elements of this plea by clear and convincing evidence. The statute also requires a two prong test to prove this defense:

First: was the Defendant "afflicted with a mental disease or defect?"

Both experts, all lay witnesses, and the attorneys agree that the Defendant suffers from a qualifying mental disease: paranoid schizophrenia. The Defendant clearly began suffering from this illness well before June 21, 2000 and suffered from this illness at the time of shooting Officer Moritz. I quote from the report of Dr. Moran, the state's Expert Witness. "There seems to be little doubt that on June 21, 2000, the Defendant was suffering from paranoid delusions."

Having established the first prong, the law then requires the Defendant to prove that the mental disease or defect was so severe that "the person did not know the criminal act was wrong." Therefore, it is not enough under the law for the Defendant to prove that he had a mental disease, or even that the mental disease affected his conduct at the time of the shooting. The Defendant must prove by clear and convincing evidence that the disease or defect caused him to not know his criminal act was wrong. Therefore, that is the focus of the Court.

To make this determination the court looks to the facts of the crime, the evaluations of the experts, the Defendant's actions and behavior both before and after the shooting, and the observations of those that knew Eric.

The court considered the following evidence:

- Defendant's statements at Thorpe Park to Jason Tackett and Mark Fields;
- Defendant's actions in driving through a residential area early in the morning with loud music to attract law enforcement;
- That the Defendant was aware that Officer Moritz was a police officer:

  A.) Emergency lights on the police car were on;

  B.) Siren was on briefly;

  C.) Police car clearly marked;

  D.) Officer Moritz was in uniform;
- Defendant's general level of functioning before and after the shooting;

- The lack of any precipitating event prior to the shooting which would have caused him to break with reality;
- After the shooting, the Defendant fled the scene;
- For 16 hours after the shooting Defendant avoided capture. He saw police cars and police and hid and ran from them.
- Defendant disposed of the murder weapon;
- Defendant knew enough to stop resisting once his life was in jeopardy;
- After Defendant's apprehension he made comments acknowledging that he was aware of other charges pending: " . . . potential problems (sic) heading my way, I don't know for sure because I got arrested earlier."
- The Defendant in the Interrogation Room followed instructions and complied with requests.

From all of this the Court must conclude that, while the Defendant was affected by his mental illness, it did not, pursuant to the requirements of the statute, distort his perception of reality so severely that he did not know his actions were wrong. Accordingly, the Court finds the Defendant guilty of the First Degree Murder of Officer Jeff Mortiz.

Sentencing is set for *October 2, 2003 at 10:00 a.m.*

The Court orders Probation to prepare a Presentence Report in this matter.

These proceedings are adjourned.

/s/ H. Jeff Coker
H. Jeffrey Coker,
Judge of the Superior Court

IN THE COURT OF APPEAL
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. ERIC MICHAEL CLARK, Appellant.	1 CA-CR 03-0851 1 CA-CR 03-0985 (Consolidated) DEPARTMENT D **MEMORANDUM DECISION** (Filed Jan. 25, 2005) (Not for Publication – Rule 111, Rules of the Arizona Supreme Court) (Amended by Order filed 5-5-05)

Appeal from the Superior Court in Coconino County

Cause No. CR 2000-0538

The Honorable H. Jeffrey Coker, Judge

AFFIRMED

Terry Goddard, Attorney General — Phoenix
By Randall M. Howe, Chief Counsel, Criminal Appeals Section
and Michael T. O'Toole, Assistant Attorney General
Attorneys for Appellee

David Goldberg
Attorney for Appellant — Flagstaff

SNOW, Judge

¶1 Eric Michael Clark, appeals from his conviction and sentence for first degree murder, a Class 1 felony. He argues: (1) that substantial evidence did not support his conviction for first degree murder; (2) that the court abused its discretion in finding that he had not proven, by clear and convincing evidence, that he was insane at the time of the murder; (3) that Arizona Revised Statutes ("A.R.S.") section 13-502(A) (2000) violates the due process and equal protection clauses of the Arizona and United States Constitutions; and (4) that his sentence of life in prison without the possibility of parole for twenty-five years is disproportionate of the crime committed and therefore violates the Eighth Amendment interdiction against cruel and unusual punishment. For reasons set forth below, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 We view the facts in the light most favorable to sustaining the verdict and resolve all inferences against the appellant. *State v. Fontes,* 195 Ariz. 229, 230, ¶ 2, 986 P.2d 897, 898 (App. 1998).

¶3 In June 2000, a few weeks prior to the murder, Clark commented to some friends having a barbecue in a park in Flagstaff, Arizona, that he wanted to shoot police officers. One friend remembered him saying: "If I came up here with my .22 caliber hand pistol . . . and started firing off, when the police come, I will get them out of their cars and start – I have rifles and I'll start shooting them in the head." That same friend recalled another instance a month or two before the shooting in which Clark made a comment

that suggested that he was angry with police and "wanted to show them."

¶4 Sometime in the early morning of June 21, 2000, Clark went to his parents' house on University Heights Drive South and took the keys to his brother's green Toyota pickup truck. He then began driving around an adjacent neighborhood, blaring loud music from the radio and disturbing the residents. One resident estimated that Clark drove about twenty-two laps around the same block. He called the police to report it around the eighteenth lap.

¶5 Flagstaff Police Officer Jeffrey Moritz responded and located the pickup truck. It started "running from" him, and Moritz activated his emergency lights and made the stop. He informed dispatch that he was going to "be out with him," meaning the driver of the truck. Moments later Moritz radioed, "999[1], I've been hit. 999, I've been hit." Moritz then stumbled towards a nearby home, holding his chest and calling for help, until he collapsed on the ground. Clark abandoned the truck and took off on foot towards his house.

¶6 Residents heard two sets of gun shots: one a series of shots from Clark's .22 caliber handgun; the other, shots from Moritz's .40 caliber service weapon. One resident had also heard a strong voice give several commands to stay inside the vehicle shortly before hearing the shots.

¶7 Several officers converged on the scene based on Moritz's "999" call. Flagstaff Police Captain Brent Cooper, who lived nearby, also responded after he and his wife heard a police siren and gunfire. He was the first on the

[1] This is the code for "officer needs assistance immediately."

scene, arriving within "a couple of minutes" of hearing the gunshots. He found Moritz lying on the ground, twenty feet behind his police car, face up, with a small group of civilians around him. Moritz's service revolver was on the ground to the left of his body. When Cooper saw Moritz's face, he "was afraid he was gone then." All attempts to revive him proved futile.[2]

¶8 Moritz's police car was parked in the street a little behind the Toyota pickup truck. The police car's engine was still running and the overheard emergency lights were activated. The pickup truck's engine was off and its driver's side door was open.

¶9 Based on the truck's registration, police officers proceeded to Clark's parents' home on the adjacent block and set up a perimeter around the house. Clark was not found in the house, and his mother advised officers that he was "missing." At 9:00 p.m. on June 21, a Flagstaff police officer spotted Clark on a sidewalk on University Heights Drive, but Clark ran away with several officers in pursuit. Police subsequently arrested Clark at gunpoint.

¶10 When he was arrested, Clark had gunshot residue on his hands. Police found the .22 caliber handgun Clark used to shoot Moritz in a yard in the vicinity of the shooting. The gun was inside a knit cap, and tests of the gun and the cap disclosed DNA that matched Clark's.

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[2] The medical evidence at trial was that the blood supply to his brain would have been restricted as two of the four major vessels to the brain had been impaired by the trajectory of the bullet, which would have limited his ability to "mobilize and do much of anything physiologic" within two to four minutes of being shot.

¶11 The state charged Clark with one count of first degree murder, for intentionally or knowingly killing a law enforcement officer who is in the line of duty. A.R.S. § 13-1105(3). The state did not seek the death penalty. On March 28, 2001, the trial court accepted the parties' stipulation that Clark was not competent to stand trial and committed Clark to the Arizona State Hospital for treatment. On May 8, 2003, the trial court found that Clark was competent to stand trial.[3]

¶12 Clark waived his right to a jury trial, and the matter was tried to the court. In addition to other theories, Clark's primary defense was that he was legally insane at time he shot Moritz.[4] At the conclusion of the trial, the trial court rejected Clark's insanity defense and found him guilty of the first degree murder of Officer Moritz.

¶13 On October 2, 2003, the trial court sentenced Clark to life in prison without the possibility of release on any basis until he had served a minimum of twenty-five calendar years. Clark timely appealed. He also filed a motion to vacate the judgment, which the trial court denied. Clark then timely filed a supplemental notice of

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[3] The trial court specifically found that Clark was able to understand the nature of the charges, and that he could, "if he chooses, assist his attorney in his defense." The court further found that Clark's "status at this point in time is one of volition; in other words, he is choosing not to cooperate with his attorney at this time as opposed to being unable to."

[4] Defense counsel also argued that Clark was delusional and therefore did not know that Moritz was a police officer or that the shooting might have been the inadvertent result of a struggle over the weapon. He therefore asked the court to consider lesser included offenses of second degree murder and manslaughter.

appeal from the denial of the motion to vacate judgment. Both matters were consolidated on appeal.

¶14 This court has jurisdiction pursuant to the Arizona Constitution, Article 6, Section 9, and A.R.S. §§ 12-120.21(A)(1) (1992), 13-4031 and 13-4033(A)(1) (2001).

DISCUSSION

(1) *Sufficiency of the Evidence*

¶15 Clark maintains that there was insufficient evidence to support his conviction for first degree murder of a police officer.[5] He rests this argument on his claim that the state presented only circumstantial evidence to show that he (1) intentionally or knowingly caused a death and/or (2) that he intended or knew that he was killing a police officer. He therefore contends the trial court abused its discretion when it denied his motion for directed verdict.[6] We conclude that it did not.

¶16 We review the denial of a Rule 20 motion for an abuse of discretion. *State v. Sullivan,* 187 Ariz. 599, 603, 931 P.2d 1109, 1113 (App. 1996). In so doing, we view the evidence in the light most favorable to supporting the verdict. *Id.* (citations omitted). This court "will not reverse

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[5] A.R.S. § 13-1105(A)(3) provides in relevant part that a person commits first degree murder if: "Intending or knowing that the person's conduct will cause death to a law enforcement officer, the person causes the death of a law enforcement officer who is in the line of duty."

[6] Ariz. R. Evid. 20(a) provides in relevant part: "On motion of a defendant or on its own initiative, the court shall enter a judgment of acquittal of one or more offenses charged in an indictment, information or complaint after the evidence on either side is closed, if there is no substantial evidence to warrant a conviction."

a trial court's determination on grounds of insufficient evidence unless there is a complete absence of probative facts or where the judgement is contrary to substantial evidence in the record." *State v. West*, 173 Ariz. 602, 610, 845 P.2d 1097, 1105 (App. 1992) (citation omitted).

¶17 When reviewing the sufficiency of the evidence, we make no distinction between the probative value of direct and circumstantial evidence. *State v. Bible,* 175 Ariz. 549, 560 n. 1, 858 P.2d 1152, 1163 n. 1 (1993). "Evidence is sufficient if there is more than a scintilla of proof for a reasonable mind to support the conclusion." *West,* 173 Ariz. at 610, 845 P.2d at 1105 (citing *State v. Goswick,* 142 Ariz. 582, 586, 691 P.2d 673, 677 (1984)). "If reasonable [persons] may fairly differ as to whether certain evidence establishes a fact in issue, then such evidence must be considered substantial." *State v. Jones,* 188 Ariz. 388, 394, 937 P.2d 310, 316 (1997) (quoting *State v. Tison,* 129 Ariz. 546, 553, 633 P.2d 355, 362 (1981)). The evidence at trial and reasonable inferences therefrom support the conclusion that Clark knowingly and intentionally shot Moritz and knew that he was a police officer when he did so.

¶18 The evidence at trial established that Clark was angry with police officers and fantasized about ways to retaliate or "show them," suggesting a motive for his actions. It also showed that, in driving the pickup truck with its radio blaring, Clark had engaged in behavior that would attract law enforcement to the neighborhood. Clark was playing a "rap CD" at the time that contained "many antisocial attitudes" and included lyrics expressing violent attitudes toward police officers.

¶19 Clark was armed with a .22 caliber handgun with which, according to medical evidence, he shot Moritz from

a distance of "at least 2 to 2 and a half feet." The trial court was permitted to infer from Clark's use of the weapon that he intended or knew that he would kill Moritz. *State v. Herrera, Jr.*, 176 Ariz. 21, 30-31, 859 P.2d 131, 140-41 (1993). That inference is further supported by the fact that the bullet that killed Moritz entered his body at the back of his left armpit, which was consistent with Clark having been "to [Moritz's] left and behind him" when he shot him. This permits the inference that Moritz was attempting to move away from Clark when he was shot.[7]

¶20 One witness testified that she first saw Moritz standing alone outside his vehicle and then saw him at the rear of his police vehicle and "almost immediate[ly]" heard "popping sounds" just before she saw him there. This would have been consistent with Moritz's having tried to take evasive action to avoid being shot. That same witness then saw Moritz go away from his police car, towards the spot where he ultimately collapsed, while a person that appeared to be a male, moving "at a real fast walk or a jog," went in the opposite direction, away from the green truck. Evidence of flight from or concealment of a crime usually constitutes an admission by conduct, and may permit the inference of a consciousness of guilt for the crime charged. *Bible*, 175 Ariz. at 592, 858 P.2d at 1195. All of this is sufficient evidence to support the inference that Clark intentionally or knowingly shot Moritz.[8]

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[7] In this regard, it is also noteworthy that Moritz shot with his left hand.

[8] Clark's theory at trial and on appeal is that Moritz and Clark may have been struggling over Clark's gun when it went off, however there is no evidence of this in the record. Clark bases this argument on the time that elapsed relevant to when Moritz got out of his car, when

(Continued on following page)

¶21 Furthermore, there is sufficient evidence to support the inference that Clark knew that Moritz was a police officer when he shot him. Moritz was in full uniform and driving a fully equipped patrol car at the time. Witnesses testified that the police car's siren was activated at the stop and the emergency lights engaged. Although, it was early morning, it was already getting light outside. The fact that Clark pulled over in response to the siren and lights also indicates that he realized he was being stopped by a police officer.

¶22 Based on this evidence, we cannot say that the trial court abused its discretion in denying Clark's Rule 20 motion. *Sullivan,* 187 Ariz. at 603, 931 P.2d at 1113.

(2) *Determination that Clark was Not Insane*

¶23 Clark also argues that the trial court abused its discretion when it determined that he did not prove, by clear and convincing evidence, that he was legally insane at the time he shot Moritz. Our review of the record shows that it did not.

¶24 Section 13-502(A) provides that "[a] person may be found guilty except insane if at the time of the commission of the criminal act the person was afflicted with a mental disease or defect of such severity that the person did not know the criminal act was wrong." Legal insanity is an

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he was heard to command Clark to stay inside, and when the first gun shots were fired. However the radio transmission evidence shows that thirty seconds elapsed from the time Moritz likely exited his car, after transmitting the license plate number, and radioed that he was "hit." Based on this evidence, Clark's theory that Moritz may have been recklessly shot during a struggle seems speculative at best.

affirmative defense that a defendant must prove by clear and convincing evidence. A.R.S. § 13-502(A), (C) (1996).

¶25 We review for abuse of discretion a trial court's finding that a defendant did not prove an insanity defense by clear and convincing evidence. *State v. Zmich,* 160 Ariz. 108, 111, 770 P.2d 776, 779 (1989). We view the evidence in the light most favorable to supporting the trial court's judgment and presume that the judgment is correct if there is any reasonable evidence in the record to sustain it. *State v. Veatch,* 132 Ariz. 394, 396, 646 P.2d 279, 281 (1982). Furthermore, we will not substitute our discretion for that exercised by the trial court. *Id.*

¶26 To prove an insanity defense, a defendant must establish, first, that he was suffering from a mental disease or defect and, second, that the mental disease or defect was of such severity that it rendered him unable to understand the wrongfulness of his conduct. A.R.S. § 13-502(A). Neither party disputed the fact that Clark was suffering from a mental disease, paranoid schizophrenia, at the time of the murder, and that he had suffered from it for quite some time.

¶27 The trial court agreed that Clark had proven that he was "afflicted with a mental disease or defect" at the time of the shooting, but found that he had failed to prove, by clear and convincing evidence, that this disease or defect prevented Clark from knowing that shooting Moritz was wrong. In reaching its decision, the trial court specified that it had considered "the facts of the crime, the evaluations of the experts, the Defendant's actions and behavior both before and after the shooting and the observations of those that [sic] knew Eric." The trial court was justified in

considering all of these factors and the evidence in the record supports its decision.

¶28 Clark's expert witness, Dr. Morenz, concluded that Clark's mental disease rendered him incapable of appreciating that his conduct was wrong. The State's expert, Dr. Moran, concluded that it did not. To the extent that the trial court may have accepted Dr. Moran's evaluation over Dr. Morenz's, it was entirely within the trial court's province to do so. As the trier of fact in this case, it was free to believe or disbelieve the testimony of either expert, *State v. Sanchez,* 117 Ariz. 369, 373, 573 P.2d 60, 64 (1977), and resolve any conflicts in the psychological testimony. *State v. Mauro,* 159 Ariz. 186, 206, 766 P.2d 59, 79 (1988).

¶29 In reaching its decision that Clark had not proven insanity, it also appears that the trial court gave significant consideration to Clark's own actions both before and after the shooting. For example, its judgment specifically noted Clark's actions in driving through residential neighborhoods with loud music "to attract law enforcement," as well as his behavior in evading capture before his arrest at gunpoint and in disposing of the murder weapon afterwards. The mode of operation of the mind may be ascertainable from Clark's conduct; therefore Clark's conduct is admissible into evidence as it may indicate sanity or insanity or at least throw light one way or another on the issue. *See State v. Hurles,* 185 Ariz. 199, 205, 914 P.2d 1291, 1297 (1996) (quoting 2 Wigmore on Evidence § 228 (1979)). The trial court in this case correctly considered Clark's pre- and post-crime behavior in concluding that Clark had not proven insanity by a preponderance of the evidence.

¶30 "The rule is not what we would do if we were deciding the case, but whether or not we can say that the trial judge abused [his] discretion in reaching the conclusions [he] did." *Zmich*, 160 Ariz. at 111, 770 P.2d at 779 (citations omitted). Based on the evidence, we find no abuse of discretion in the trial court's determination that Clark did not prove by clear and convincing evidence that he was insane pursuant to A.R.S. § 13-502(A) at the time of the crime.

(3) *Constitutionality of A.R.S. § 23-502(A)*

¶31 At the beginning of the insanity phase of the trial, the trial court asked trial counsel to submit memoranda on the status of Arizona law regarding insanity so that it could "have a clear understanding of your relative positions" before the experts testified. In his memorandum, defense counsel argued that § 13-502(A) was unconstitutional because (1) it did not allow him to present a "complete defense" under the *M'Naghten*[9] test for insanity to show that he could not appreciate the nature and quality of his acts; (2) it violated his due process by requiring him to prove insanity by clear and convincing evidence; and (3) it shifted the burden of proof to Clark on the specific

[9] The *M'Naghten* two-prong test for legal insanity provided that a person was not responsible for his criminal conduct by reason of insanity if at the time of the criminal conduct (1) the person was suffering from such a mental disease or defect as not to know the nature and quality of the act, or (2) if such a person did not know that what he was doing was wrong. *See State v. Mott*, 187 Ariz. 536, 541, 931 P.2d 1046, 1051 (1997).

element of intent.[10] The prosecutor's memorandum focused on our supreme court's decisions in *State v. Mott*, 187 Ariz. 536, 931 P.2d 1046 (1997), and *State v. Casey*, 205 Ariz. 359, 71 P.3d 351 (2003), and the fact that "diminished capacity" is not a recognized defense in Arizona. The trial court concluded that it was bound by *Mott*, but nonetheless permitted Clark to present evidence concerning his ability to form the necessary intent to commit the crime.

¶32 At the end of his case, Clark moved again for a directed verdict, relying on his previous Rule 20 arguments "but now in consideration of all the evidence that's been presented." The trial court denied the motion.

¶33 After trial, Clark moved to vacate his conviction, arguing that: (1) the insanity statute violated due process; (2) the court's failure to consider whether, due to his illness, he was unable to form the necessary *mens rea* to commit the offense deprived him of his fundamental right to present a defense; and (3) requiring him to prove insanity by clear and convincing evidence violated his due process rights and his right to equal protection.

¶34 He renews these arguments on appeal. We find them to be without merit.

¶35 We review a challenge to a statute's constitutionality *de novo* as a matter of law. *Casey*, 205 Ariz. at 362, ¶ 8, 71 P.3d at 354. "Statutes are presumed constitutional and the burden of proof is on the opponent of a statute to show that it infringes upon a constitutional guarantee or

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[10] Defense counsel's memorandum noted that because it was preserving these arguments for the record, it did not request the State to respond.

violates a constitutional principle." *Id.* at ¶ 11 (quoting *State v. Wagstaff,* 164 Ariz. 485, 494, 794 P.2d 118, 127 (1990)).

(a) *Due Process Violation*

¶36 Clark argues that A.R.S. § 13-502(A) violates due process because it does not incorporate the first prong of the *M'Naghten* insanity test, which would also permit him to establish that his mental disease or defect was such that it precluded him from knowing "the nature and quality of the act" he committed.

¶37 First, while the due process clause affords an incompetent defendant the right not to be tried, there is no constitutional requirement that a state recognize an insanity defense. *Medina v. California,* 505 U.S. 437, 449 (1992) (citing *Powell v. Texas,* 392 U.S. 514, 536-37 (1968)). Second, consistent with the general rule that both crimes and defenses are matters of state law, the United State's Supreme Court has recognized that individual states are free to recognize and define the insanity defense as they see fit. *Patterson v. New York,* 432 U.S. 197, 201-02 (1977). Clark therefore fails to prove how eliminating the first prong of the *M'Naghten* test establishes a violation of due process under either the Arizona or United States Constitutions.[11]

¶38 Moreover, as the Supreme Court has noted, the *M'Naghten* test for insanity turns on the finding of "criminal irresponsibility" at the time of the criminal offense.

[11] "The federal and state due process clauses contain nearly identical language and protect the same interests." *Casey,* 205 Ariz. at 362, ¶ 11, 71 P.3d at 354.

Foucha v. Louisiana, 504 U.S. 71, 97-99 (1992). It is difficult to imagine that a defendant who did not appreciate the "nature and quality" of the act he committed would reasonably be able to perceive that the act was "wrong." Therefore, we do not find that the language would add significantly to the test available in the statute. *See also State v. Chavez,* 143 Ariz. 238, 239, 693 P.2d 893, 894 (1984) (holding that jury instruction that erroneously omitted the language of the first prong of the *M'Naghten* test was not error because if the jury believed defendant did not know the nature of his acts it could not have found that he did not know their probable results).

(b) *Equal Protection Violation*

¶39 Clark also contends that A.R.S. § 13-502(A) violates his equal protection rights by requiring him to prove insanity by "clear and convincing evidence" when other affirmative defenses may be proven by a "preponderance of the evidence." *See* A.R.S. § 13-205(A).[12] This argument fails as well.

¶40 "The Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons." *Romer v. Evans,* 517 U.S. 620, 631 (1996) (citations omitted). "[I]f a law neither burdens a fundamental right nor targets a

[12] This section provides: "Except as otherwise provided by law, a defendant shall prove any affirmative defense raised by a preponderance of the evidence, including any justification defense under chapter 4 of this title."

suspect class," reviewing courts will uphold the legislative classification as long as it bears a "rational relation to some legitimate [state] end." *Id.*

¶41 As we note above, the statutory provision concerning the insanity defense does not burden a fundamental constitutional right. *Medina,* 505 U.S. at 452-53; *see also State v. Bethel*, 66 P.3d 840, 841-44, 851 (Kan. 2003) (affirmative defense is creature of 19th Century and not so ingrained in legal system as to constitute fundamental principle of law).Nor does Clark establish that defendants who propound an insanity defense are a suspect class. Therefore, Clark is not entitled to a strict scrutiny analysis.

¶42 Because insanity is an affirmative defense rather than an element of the crime, the Legislature may allocate to Clark the burden of proving it. *Cf. State v. Farley*, 199 Ariz. 542, 545, ¶ 14, 19 P.3d 1258, 1261 (App. 2001) (may allocate to defendant the burden of proving justification defense). The state has a rational interest in holding citizens responsible for their criminal conduct. Placing a higher burden on those who claim they are completely not responsible for their criminal conduct is a rational means of accomplishing that end. *See also State v. King,* 158 Ariz. 419, 421, 763 P.2d 239, 241 (1988) (rejecting due process and equal protection challenges to insanity statute).

(c) *Ability to Form Mens Rea*

¶43 Clark argues that the trial court erred in refusing to consider evidence of his mental disease or defect in determining whether he had the requisite *mens rea* to commit first-degree murder. However, the record shows that the trial court did not prevent Clark from presenting such

evidence, despite our supreme court's decision to the contrary in *Mott,* even going so far as to permit him to make an offer of proof on the issue at the close of the evidence.[13]

¶44 Aside from the evidence offered to prove his insanity generally, Clark specified no evidence in his offer of proof that demonstrated he was not capable of knowing he was killing a police officer. Even assuming such evidence was sufficient, the trial court was bound by the supreme court's decision in *Mott,* which held that "Arizona does not allow evidence of a defendant's mental disorder short of insanity either as an affirmative defense or to negate the *mens rea* element of a crime."[14] 187 Ariz. at 541, 931 P.2d at 1051. Even assuming we agree with the dissent in *Mott,* we do not have the ability to disregard it as the controlling law in Arizona. *State v. Long,* 207 Ariz. 140, 145, ¶ 23, 83 P.3d 618, 623 (App. 2004) ("This court is bound by decisions of the Arizona Supreme Court and has no authority to overturn or refuse to follow its decisions.").

¶45 Clark acknowledges that we are without authority to overrule *Mott,* but nonetheless argues that it was

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[13] The *mens rea* requirement for this crime was defined statutorily. A.R.S. § 13-1105(a)(3) ("A person commits first degree murder if . . . intending or knowing that the person's conduct will cause death to a law enforcement officer, the person causes the death of a law enforcement officer who is in the line of duty.").

[14] *State v. McKeon,* 201 Ariz. 571, 38 P.3d 1236 (App. 2002), on which Clark relies, dealt with the issue of involuntary intoxication from the non-abusive use of prescription medications. It also acknowledges that *Mott* still controls on the insanity defense. *Id.* at 575, 120 n.2, 38 P.3d at 1240 n.2.

wrongly decided and should be overruled.[15] *See State v. Foster,* 199 Ariz. 39, 41, ¶ 9 n.1, 13 P.3d 781, 783 n.1 (App. 2000). We do not consider those arguments.

(4) Sentence Violates Eighth Amendment

¶46 Finally, Clark maintains that his sentence to life without the possibility of release until he has served a minimum of twenty-five calendar years is disproportionate and violates the Eighth Amendment prohibition against cruel and unusual punishment. We find that it does not.

¶47 We review *de novo* whether a penalty is unconstitutionally disproportionate to the crime. *See, e.g., In re One Residence at 319 E. Fairgrounds Dr.,* 205 Ariz. 403, 409, ¶ 20, 71 P.3d 930, 936 (App. 2003) (reviewing proportionality of punitive forfeiture). The proportionality analysis of a sentence requires us to compare the "gravity of the offense, understood to include not only the injury caused, but also the defendant's culpability, with the harshness of the penalty." *State v. Davolt,* 207 Ariz. 191, 215, ¶ 102, 84 P.3d 456, 480 (2004) (citations and quotations omitted). The mandatory nature of a sentence does not render it disproportionate. *State v. Jonas,* 164 Ariz. 242, 249, 792 P.2d 705, 712 (1990).

¶48 The first step in a proportionality analysis is to determine if an inference of gross disproportionality between Clark's crime and his sentence can be drawn. *State v. Davis,* 206 Ariz. 377, 384, ¶ 35, 79 P.3d 64, 71 (2003). Even given Clark's mental condition, we find in

[15] He raises the issue for the purpose of preserving it for further appellate review.

this case that it cannot. A life sentence with the possibility of release after 25 years is simply not disproportionate to the crime of first degree murder. *See, e.g., Ewing v. California,* 533 U.S. 11, 20-31 (2003) (twenty-five year sentence for stealing ~~gold~~ golf clubs under "three strikes law" not constitutionally disproportionate sentence).

CONCLUSION

¶49 For the foregoing reasons, we affirm Clark's conviction and sentence.

/s/ G. Murray Snow
G. Murray Snow, Judge

CONCURRING:

/s/ Pat K. Norris
Patricia K. Norris, Presiding Judge

/s/ Patrick Irvine
Patrick Irvine, Judge

[LOGO]

Supreme Court

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CLERK OF THE COURT

KATHLEEN E. KEMPLEY
CHIEF DEPUTY CLERK

May 25, 2005

RE: **STATE OF ARIZONA v ERIC MICHAEL CLARK**
Arizona Supreme Court No. CR-05-0047-PR
Court of Appeals, Division One, Nos. 1 CA-CR 03-0851 and 1 CA-CR 03-0985 (Consolidated)
Coconino County Superior Court No. CR 2000-0538

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on May 24, 2005, in regard to the above-referenced cause:

ORDERED: Appellant's Petition for Review = DENIED.